


3 1761 11649329 7





Digitized by the Internet Archive  
in 2023 with funding from  
University of Toronto











VOLUME

2

3

# RESTRUCTURING THE RELATIONSHIP

PART ONE

---

REPORT  
OF THE ROYAL COMMISSION  
ON ABORIGINAL PEOPLES





## Canadian Cataloguing in Publication Data

Canada. Royal Commission on Aboriginal Peoples.  
*Report of the Royal Commission on Aboriginal Peoples.*

Issued also in French under the title:  
*Rapport de la Commission royale sur les peuples autochtones.*

### Contents:

- v. 1. Looking forward, looking back –
- v. 2. Restructuring the relationship –
- v. 3. Gathering strength –
- v. 4. Perspectives and realities –
- v. 5. Renewal: a twenty-year commitment

ISBN 0-660-16413-2 (V. 1);

ISBN 0-660-16414-0 (V. 2);

ISBN 0-660-16415-9 (V. 3);

ISBN 0-660-16416-7 (V. 4);

ISBN 0-660-16417-5 (V. 5).

Cat. no. Z1-1991/1-1E (V. 1);

Cat. no. Z1-1991/1-2E (V. 2);

Cat. no. Z1-1991/1-3E (V. 3);

Cat. no. Z1-1991/1-4E (V. 4);

Cat. no. Z1-1991/1-5E (V. 5).

- 1. Native peoples – Canada.
- 2. Native peoples – Canada – Social conditions.
- 3. Native peoples – Canada – Economic conditions.
- 4. Native peoples – Canada – Politics and government.
- I. Title.

E78.C2R46 1996

971'.00497

C96-980078-9

© Minister of Supply and Services Canada 1996

Available in Canada through  
your local bookseller  
or by mail from  
Canada Communication Group – Publishing  
Ottawa, Canada K1A 0S9

Cat. no. Z1-1991/1-2E

ISBN 0-660-16414-0

Cover: Roger Simon, "Raven Woman", oil on diamat paper,  
66.5 x 56.5 centimetres, framed.

Endpapers: Mireille Sioui, "Dans la maison d'Handiaouich, la petite tortue",  
intaglio, watercolour on paper, 50 x 32.5 centimetres.

Both, collection of the Indian Art Centre, Department of Indian Affairs  
and Northern Development. Photographer, Lawrence Cook.  
Photograph facing page 1: Fred Cattroll.



Canada	Groupe
Communication	Communication
Group	Canada
Publishing	Édition





VOLUME  
2  
RESTRUCTURING  
THE RELATIONSHIP  
PART ONE\*

CONTENTS

<b>1 ■ Introduction</b>	<b>1</b>
1. Treaties	2
2. Governance	4
3. Lands and Resources	5
4. Economic Development	6
<b>2 ■ Treaties</b>	<b>9</b>
1. A Need For Public Education	13
1.1 Treaties are Nation-to-Nation	18
1.2 Treaties are Sacred and Enduring	18
1.3 Treaties are Part of the Canadian Constitution	20
1.4 Fulfilment of the Treaties is Fundamental to Canada's Honour	21
2. Legal Context of the Treaty Relationship	22
3. Historical Treaties: The Need for Justice and Reconciliation	36
3.1 The Need for Justice	37
3.2 The Need for Reconciliation	38
3.3 Common Ground in the Treaties	39
3.4 Lack of Common Ground	39
3.5 The Vulnerability of Treaties	41
3.6 Implementing the Spirit and Intent of Treaties	41
3.7 The Fiduciary Relationship: Restoring the Treaty Partnership	42
3.8 Aboriginal Rights and Title: Sharing, Not Extinguishment	44
3.9 Sovereignty and Governance	47
3.10 Observations Regarding Fulfilment of the Historical Treaties	48
4. Treaty Implementation and Renewal Processes	50

---

\* Because of its length, Volume 2 is published in two parts, the first containing Chapters 1 to 3 and the second Chapters 4 to 6.

5. Treaty-Making Processes	58
5.1 Implementation of Modern Treaties	60
5.2 The Peace and Friendship Treaties	61
5.3 Making New Treaties and Equivalent Agreements	62
<i>Inuit land claims agreements</i>	63
<i>Métis treaties</i>	63
6. Establishment of Treaty Processes	64
6.1 A Royal Proclamation	65
6.2 Companion Legislation	66
7. Content of Treaty Processes	70
7.1 Entry to be Voluntary	70
7.2 Timing to be Realistic	71
7.3 Long-Term Resources to be Available	72
7.4 Nature and Scope of Items for Discussion	72
<i>Governance</i>	73
<i>Lands and resources</i>	74
<i>Economic rights</i>	76
Treaty annuities	77
Hunting, fishing and trapping	77
Other economic issues	78
<i>Other treaty issues</i>	78
7.5 Outcomes of Treaty Processes	80
<i>Protocol agreement</i>	81
<i>Supplementary treaty</i>	81
<i>Replacement treaty</i>	82
7.6 Reorganization in Preparation for Treaty Processes	83
<i>The gradual dispersal of Crown obligations</i>	83
<i>A Crown treaty office</i>	84
<i>The role of provincial governments</i>	85
7.7 Reorganization of Aboriginal and Treaty Nations	87
<i>What is an Aboriginal or treaty nation?</i>	87
<i>Displacement and deconstruction of the Indian nations as policy</i>	88
8. Institutions for Treaty Processes	89
8.1 Treaty Commissions	90
8.2 An Aboriginal Lands and Treaties Tribunal	93
Notes	94

3 ■ Governance	105
1. Aboriginal Perspectives	108
1.1 Basic Concepts	108

1.2 Traditions of Governance	115
<i>The centrality of the land</i>	117
<i>Individual autonomy and responsibility</i>	119
<i>The rule of law</i>	119
<i>The role of women</i>	122
<i>The role of elders</i>	126
<i>The role of the family and clan</i>	128
<i>Leadership</i>	130
<i>Consensus in decision making</i>	134
<i>The restoration of traditional institutions</i>	137
1.3 Visions of Governance	139
<i>Territorial jurisdiction</i>	141
Authority over exclusive territories	142
Authority over shared territories	146
Public governments	149
<i>Communal jurisdiction</i>	150
The extraterritorial approach	151
The layered approach: Métis initiatives	153
The community of interest approach	154
<i>Levels of governance</i>	156
First Nations approaches	157
Métis Nation approaches	161
Inuit approaches	162
2. Toward an Aboriginal Order of Government	163
2.1 An Overview	163
<i>Attributes of good government</i>	163
<i>Self-determination and self-government: overview</i>	165
2.2 Self-Determination	169
<i>International human rights law</i>	169
<i>Self-determination and self-government</i>	174
<i>Aboriginal peoples: political groups, not racial minorities</i>	176
<i>The Aboriginal nation as the vehicle for self-determination</i>	177
<i>Identifying Aboriginal nations</i>	182
2.3 Self-Government	184
<i>The common law doctrine of Aboriginal rights and the inherent right of self-government</i>	186
<i>The process of constitution building</i>	193
<i>A constitutional watershed: the Constitution Act, 1982</i>	199
<i>The inherent right of self-government is entrenched in the constitution</i>	202



<i>The scope of constitutional self-government</i>	213
<i>The Canadian Charter of Rights and Freedoms</i>	226
Two approaches	227
The Commission's view	230
<i>The central role of the Aboriginal nation</i>	234
<i>Citizenship in Aboriginal nations</i>	237
<i>Three orders of government</i>	240
3. Implementing an Aboriginal Order of Government	245
3.1 Models of Aboriginal Government: An Overview	245
<i>Model 1: The nation model</i>	250
Lands and territory	250
Citizenship	251
Jurisdiction and powers	253
Internal government organization	255
<i>Units of government</i>	255
<i>Allocation of jurisdiction through the nation</i>	257
<i>Legislative, executive and judicial branches</i>	258
<i>Administration and delivery of programs and services</i>	258
<i>Internal government procedures</i>	259
<i>Constitution</i>	261
Urban extensions of Aboriginal nation government	262
<i>Extra-territorial jurisdiction</i>	262
<i>Host nation</i>	262
<i>Treaty nation government</i>	263
<i>Métis Nation government in urban areas</i>	263
Associated models of inter-Aboriginal government organization	264
<i>Structures</i>	265
<i>Jurisdiction</i>	265
<i>Model 2: The public government model</i>	265
Lands and territory	265
Constituency of residents	267
Jurisdiction, powers and authority	268
Internal government organization	269
<i>Units of government</i>	269
<i>Allocation of jurisdiction among units of government</i>	270
<i>Legislative, executive and judicial structures</i>	271
<i>Internal government procedures</i>	271
<i>Constitution</i>	272
Relationships with other Aboriginal governments	272

<i>Model 3: The community of interest model</i>	273
Lands and territory	273
Membership	273
Jurisdiction and powers	274
Internal government organization	276
<i>Units of government</i>	276
<i>Structures of government</i>	276
<i>Internal government procedures</i>	277
<i>Constitution</i>	277
Relationships with other Aboriginal governments	277
<i>Conclusion</i>	278
3.2 Financing Aboriginal Government	280
<i>Objectives for financing Aboriginal governments</i>	281
Self-reliance	281
Equity	281
Efficiency	282
Accountability	282
Harmonization	282
<i>A principled basis for new financial arrangements</i>	282
The renewed relationship and financial arrangements for Aboriginal governments	283
Features distinguishing Aboriginal and non-Aboriginal governments: implications for financial arrangements	285
<i>Funding sources and instruments for Aboriginal governments</i>	288
Own-source funding	289
<i>Taxation</i>	289
<i>Resource rents and royalties</i>	293
<i>User fees, licences and fines</i>	294
<i>Gaming</i>	294
<i>Aboriginal and public corporation revenues</i>	294
Transfers from other governments	295
<i>Conditional transfers</i>	295
<i>Unconditional transfers</i>	296
Entitlements from treaties and land claims	299
<i>Specific claims settlements</i>	299
<i>Comprehensive claims settlements and treaty land entitlements</i>	300
Borrowing authority	302
<i>Financial arrangements for models of Aboriginal government</i>	303
Funding instruments and sources: compatibility with the models and feasibility	303

Own-source funding	303
Transfers from other governments	305
Entitlements from treaties and land claims settlements	306
Borrowing authority	307
<i>Toward a Canada-wide framework for fiscal relations among the three orders of government</i>	307
Objectives of a framework agreement for financing Aboriginal governments	308
Transfer regime	308
Co-ordination mechanisms and agreements	309
Implementing the framework	310
4. Transition	310
4.1 Transitional Measures on the Road to Self-Government	311 ✓
<i>A royal proclamation and companion legislation</i>	312
<i>Rebuilding and recognizing Aboriginal nations</i>	314
Stage 1: Organizing for recognition	314
Stage 2: Preparing the nation's constitution and seeking its endorsement	316
Stage 3: Getting recognition	319
<i>A Canada-wide framework agreement</i>	321
<i>Negotiation of new or renewed treaties</i>	325
4.2 Capacity Building: Aboriginal Strategies for the Transition to Self-Government	326
<i>Capacity to rebuild Aboriginal nations and reclaim nationhood</i>	327
Cultural revitalization and healing	328
Political processes for consensus building	329
<i>Capacity to set up governments</i>	332
<i>Capacity to negotiate new intergovernmental arrangements</i>	333
<i>Capacity to exercise governmental powers over the long term</i>	335
Current Aboriginal human resource base	335
Professionalization	338
Leadership	340
<i>Strategies supporting capacity building</i>	341
Training and human resource development	341
Partnerships between Aboriginal and Canadian governments	344 ✓
Establishing accountability systems for Aboriginal government	345
Data collection and information management	349
4.3 The Structure of the Government of Canada for the Conduct of Aboriginal Affairs	353
<i>Lessons from history</i>	354
<i>The organizational challenge</i>	355 ✓



Policy capacity	356
Implementation issues	356
Current trends in government organization	357
<i>Proposed principles</i>	359
<i>Implications for the federal role</i>	359
<i>The proposed organizational structure</i>	361
The cabinet structure	361
Portfolio of the minister of Aboriginal relations	369
Our proposals and the North	371
<i>Conclusion</i>	371
4.4 Representation in the Institutions of Canadian Federalism	374
<i>Representation in Parliament</i>	375
<i>An Aboriginal parliament as a first step toward a House of First Peoples</i>	377
Legislation	379
Constitutional matters relating to Aboriginal peoples	379
Review and oversight	380
Fact finding and investigation	380
<i>Conclusion</i>	382
Notes	382
Appendix 3A Existing Financial Arrangements for Aboriginal Governments and Regional and Territorial Governments	411
Appendix 3B A Summary of the Proposal by the Native Council of Canada for a House of the First Peoples	418

## PART TWO

<b>4 ■ Lands and Resources</b>	421
1. The Case for a New Deal	424
2. A Story	431
3. Lands and Resources: Background	434
3.1 Lessons from the Hearings	434
3.2 Significance of Lands and Resources to Aboriginal Peoples	448
<i>Aboriginal territories, use and occupancy</i>	452
<i>Boundary maintenance</i>	456
<i>Property and tenure</i>	457
<i>Management</i>	459
<i>Traditional ecological knowledge</i>	460
<i>Subsistence</i>	462
4. How Losses Occurred	464

4.1	The Law's Initial Promise	465
4.2	Losing the Land	467
	<i>The first reserves</i>	472
	<i>The prairie west</i>	473
	<i>British Columbia</i>	476
	<i>The North</i>	478
	<i>Forgotten promises</i>	484
4.3	Failure of Alternative Economic Options	485
	<i>Agriculture</i>	487
	<i>Minerals, oil and natural gas</i>	490
	<i>Forestry</i>	493
	<i>Wildlife harvesting</i>	496
	Fishing	498
	Subsistence hunting and fishing	499
	Tourism	507
	Trapping	507
	<i>Disrupting the harvest: 1950-1970</i>	513
4.4	The Impact of Crown Land Management Systems	519
	<i>State management and open access</i>	520
	<i>Excluding customary uses</i>	522
	<i>Differing views of common property</i>	523
	<i>The theory and practice of land and resource management</i>	525
	<i>The effect on Aboriginal governance</i>	526
4.5	Conclusion	526
5.	The Inadequacy of Federal Claims Processes	527
5.1	A Background of Aboriginal Protest	528
5.2	Three Existing Claims Policies	533
	<i>The comprehensive claims process</i>	535
	Criteria for acceptance of claims	536
	What Aboriginal people must relinquish	537
	Scope of the benefits Aboriginal groups can negotiate	538
	The lack of interim measures	538
	The incentive to negotiate	539
	The Coolican report and revisions to policy	539
	Existing claims settlements	540
	The British Columbia Treaty Commission	541
	The 1995 fact finder's report on surrender and certainty	542
	<i>The specific claims process</i>	544
	<i>Claims of a third kind</i>	548

5.3	Specific Claims Initiatives: 1990-1995	549
	<i>Indian Claims Commission</i>	549
	<i>The joint government/First Nations working group on claims policy</i>	550
	<i>The AFN chiefs' committee on claims</i>	551
	<i>Public awareness</i>	551
5.4	The Institutional Interests of the Federal Government	552
	<i>Assimilation policies</i>	553
	<i>Federal policy on Aboriginal lands and resources</i>	554
5.5	Conclusion: The Need for Structural Change	556
6.	A New Deal for Aboriginal Nations	557
6.1	Redressing the Consequences of Territorial Dispossession	557
6.2	The Contemporary Law of Aboriginal Title as a Basis for Action	559
	<i>Interim relief</i>	563
	<i>A duty to protect Aboriginal lands and resources</i>	565
	<i>Summary</i>	568
6.3	A New Approach to Lands and Resources	568
	<i>New terms and new processes</i>	569
	<i>Integrating treaty processes with lands and resources</i>	570
	<i>Principles to guide federal policy and treaty processes</i>	572
	Providing sufficient territory to foster economic self-reliance and cultural and political autonomy	574
	Categorizing traditional territories to foster coexistence	578
	Protecting third-party rights and interests	582
	Common law fee simple interests and civil law rights of ownership	582
	Lesser interests on Crown lands	583
	<i>Parks and protected areas</i>	586
	<i>Public interests on Crown land</i>	587
	Interim relief agreements	587
	<i>Rights concerning lands and resources and the role of provincial governments</i>	590
6.4	An Aboriginal Lands and Treaties Tribunal	591
	<i>Rationale for a tribunal</i>	593
	<i>Jurisdiction of the tribunal</i>	594
	Specific claims	595
	<i>The tribunal and the negotiating process</i>	596
	<i>Substantive questions</i>	597
	Treaty-making, implementation and renewal processes	599
	<i>Land claims</i>	599



<i>Implementing the right of self-government</i>	600
Compliance	601
Interim relief	601
<i>Constitutional foundations</i>	604
A federal tribunal with additional powers delegated by the provinces	604
A federal tribunal with exclusively federal powers	605
A federal tribunal and the constitutionally guaranteed jurisdiction of provincial superior courts	606
<i>Structure</i>	609
<i>The appointment of members</i>	610
<i>Procedure</i>	612
<i>Judicial review</i>	612
6.5 The Need for Public Education	613
<i>The role of non-Aboriginal governments</i>	615
<i>Aboriginal governments</i>	616
<i>The language of agreements</i>	616
<i>Aboriginal outreach</i>	617
<i>Government accountability</i>	617
7. Securing an Adequate Land and Resource Base for Aboriginal Nations	619
7.1 Interim Steps: Expanding the First Nations Land Base	620
<i>An interim specific-claims protocol</i>	620
<i>Fulfilment of treaty land entitlements</i>	622
<i>Purchase of land</i>	626
<i>Unsold surrendered lands</i>	628
<i>Return of expropriated lands</i>	629
7.2 Interim Steps: Improving Access to Natural Resources	631
<i>Forest resources</i>	633
Reserve forests	633
Crown forests	635
<i>Mining, oil and natural gas</i>	642
Mineral, oil and natural gas resources on reserves	643
Mineral resources on Crown lands	644
<i>Consultation</i>	644
<i>Socio-economic benefits</i>	644
<i>Protection of traditional activities</i>	645
<i>Cultural heritage</i>	646
<i>Fish and wildlife</i>	650
General regulatory issues	651
Commercial fishing	652

Hunting	656
Tourism	658
Trapping	660
<i>Water resources</i>	661
Royalties	662
Non-utility generation	662
Shared management	663
7.3 Co-management	665
<i>The origins of co-management</i>	666
<i>Claims-based co-management</i>	667
<i>Crisis-based co-management</i>	669
<i>Community-based resource management</i>	672
<i>Improving co-management regimes</i>	675
Lessons learned	675
Operations	675
Representation on co-management boards	676
Technical advice	677
Recognizing and incorporating traditional knowledge	678
Encouraging co-management	678
8. Conclusions	680
Notes	684
Appendix 4A Land Provisions of Modern Treaties	720
Appendix 4B Co-Management Agreements	735
<b>5 Economic Development</b>	
1. Understanding Aboriginal Economies	775
1.1 A Brief History of Aboriginal Economies and External Interventions	780
<i>The pre-contact period</i>	780
<i>The fur trade</i>	782
<i>The settler period</i>	784
<i>The period of dependence</i>	788
<i>Federal and Aboriginal economic development approaches since 1960</i>	790
Federal approaches to economic development	791
<i>Migration</i>	792
<i>Business development</i>	793
<i>Sectoral development</i>	794
<i>Human resources development</i>	794
<i>Community development</i>	795
Aboriginal approaches to economic development	795
Conclusion	798

1.2 Contemporary Aboriginal Economies	800
<i>Contemporary issues</i>	800
Dependence	800
Inequality	802
Demography	803
<i>The diversity of Aboriginal economies</i>	806
First Nations reserve and rural Métis economies	807
Urban economies	814
Northern economies	818
<i>Understanding Aboriginal economic development</i>	823
2. The Levers of Change	825
2.1 Transforming Aboriginal Economies: An Overview	825
2.2 The Economic Implications of Aboriginal Rights and Treaties	829
2.3 Regaining Control	832
<i>Self-government and economic development</i>	833
<i>Transferring economic development programs</i>	835
<i>Building institutions</i>	841
Problems of legitimacy	842
Inappropriate mix of politics and business	843
Lack of checks and balances	843
Canada level	843
Aboriginal nation and sectoral levels	844
Community level	845
Linkages with surrounding economies	847
2.4 Lands and Natural Resources	849
<i>The integration approach</i>	851
<i>Partnership and self-development approaches</i>	857
The partnership approach	858
The self-development approach	859
<i>Conclusion</i>	866
2.5 Agriculture: An Illustration	867
<i>Lack of land</i>	873
<i>Land tenure and use</i>	873
<i>Lack of capital</i>	877
<i>Information and technical assistance</i>	877
<i>Education and training</i>	878
2.6 Business Development	880
<i>Business development in an Aboriginal context</i>	884
<i>The Aboriginal entrepreneur</i>	889



<i>Business services</i>	892
<i>Access to loan and equity capital</i>	893
<i>The role and development of collectively owned enterprises</i>	894
Securing community commitment	896
Instilling motivation and pride	897
Equipping the community with needed skills	898
Role for political leadership	899
Other factors	900
<i>Access to markets</i>	902
Import substitution	902
Contracts, not subsidies	903
Trade expansion initiatives	904
Pursuing niche markets	904
Other strategies	905
<i>Access to capital</i>	906
Barriers to access to capital	906
Promising directions	908
<i>Community level: making banking services available</i>	908
<i>Community level: micro-business lending and support programs</i>	911
<i>Community level: revolving community loan funds</i>	913
<i>Community level: access to equity capital</i>	914
<i>Regional level: Aboriginal capital corporations</i>	916
<i>Regional level: venture capital corporations</i>	920
<i>Canada-wide level: a national Aboriginal development bank</i>	921
<i>Canada-wide level: loans for economic development on reserve lands</i>	924
<i>Canada-wide level: Indian Act options</i>	925
Amendment or suspension	926
Using forms of collateral other than land or property	927
Community-based solutions	928
Government guarantees	929
2.7 Employment Development	931
<i>The problem</i>	931
<i>Existing approaches are insufficient</i>	932
Employment equity	933
Pathways to Success	939
<i>What needs to be done differently?</i>	942

Special employment and training initiative	942
Employment equity	946
Employment services	948
Employment opportunities in Aboriginal communities	951
Child care	953
Job creation and economic policy	957
2.8 Education and Training	958
<i>Education, training and labour market outcomes</i>	958
<i>Shortages in specialized knowledge and skills</i>	962
<i>Prospects for the future</i>	963
<i>Conclusions</i>	969
2.9 Making Innovative Use of Income Support Alternatives	970
<i>Welfare dependence in historical perspective</i>	972
<i>Working within the current social assistance system</i>	977
<i>Principles of change</i>	981
Changes to the system: alternative approaches	983
<i>The individual entitlement approach</i>	984
Opportunity planning	984
Business development approach	985
Harvesters income support programs	986
<i>The community entitlement approach</i>	988
<i>Alternative interim funding possibilities</i>	990
<i>Conclusion</i>	992
2.10 Conclusion	994
Notes	996
<b>6 ■ Conclusion</b>	<b>1015</b>
1. An Act of National Intention	1016
2. Negotiating a Canada-Wide Framework	1018
3. Rebuilding Aboriginal Nations	1019
4. A Legislative Process for Treaties	1020
5. Redistributing Lands and Resources	1021
6. Meaningful Work and Sustainable Wealth	1022
7. Equipping for Self-Government	1023
Appendix A Summary of Recommendations in Volume 2 (Parts One and Two)	1025
Appendix B Abridged Tables of Contents	1084

## A NOTE ABOUT SOURCES

Among the sources referred to in this report, readers will find mention of testimony given at the Commission's public hearings; briefs and submissions to the Commission; submissions from groups and organizations funded through the Intervener Participation Program; research studies conducted under the auspices of the Commission's research program; reports on the national round tables on Aboriginal issues organized by the Commission; and commentaries, special reports and research studies published by the Commission during its mandate. After the Commission completes its work, this information will be available in various forms from a number of sources.

This report, the published commentaries and special reports, published research studies, round table reports, and other publications released during the Commission's mandate will be available in Canada through local booksellers or by mail from

Canada Communication Group – Publishing  
Ottawa, Ontario  
K1A 0S9

A CD-ROM will be published following this report. It will contain the report, transcripts of the Commission's hearings and round tables, overviews of the four rounds of hearings, research studies, the round table reports, and the Commission's special reports and commentaries, together with a resource guide for educators. The CD-ROM will be available in libraries across the country through the government's depository services program and for purchase from

Canada Communication Group – Publishing  
Ottawa, Ontario  
K1A 0S9

Briefs and submissions to the Commission, as well as research studies not published in book or CD-ROM form, will be housed in the National Archives of Canada after the Commission completes its work.

## A NOTE ABOUT TERMINOLOGY

The Commission uses the term *Aboriginal people* to refer to the indigenous inhabitants of Canada when we want to refer in a general manner to Inuit and to First Nations and Métis people, without regard to their separate origins and identities.

The term *Aboriginal peoples* refers to organic political and cultural entities that stem historically from the original peoples of North America, not to collections of individuals united by so-called ‘racial’ characteristics. The term includes the Indian, Inuit and Métis peoples of Canada (see section 35(2) of the *Constitution Act, 1982*).

*Aboriginal people* (in the singular) means the individuals belonging to the political and cultural entities known as Aboriginal peoples.

The term *Aboriginal nations* overlaps with the term Aboriginal peoples but also has a more specific usage. The Commission’s use of the term nation is discussed in some detail in Volume 2, Chapter 3, where it is defined as a sizeable body of Aboriginal people with a shared sense of national identity that constitutes the predominant population in a certain territory or collection of territories.

The Commission distinguishes between local communities and nations. We use terms such as *a First Nation community* and *a Métis community* to refer to a relatively small group of Aboriginal people residing in a single locality and forming part of a larger Aboriginal nation or people. Despite the name, a First Nation community would not normally constitute an Aboriginal nation in the sense just defined. Rather, most (but not all) Aboriginal nations are composed of a number of communities.

Our use of the term *Métis* is consistent with our conception of Aboriginal peoples as described above. We refer to Métis as distinct Aboriginal peoples whose early ancestors were of mixed heritage (First Nations, or Inuit in the case of the Labrador Métis, and European) and who associate themselves with a culture that is distinctly Métis. The more specific term *Métis Nation* is used to refer to Métis people who identify themselves as a nation with historical roots in the Canadian west. Our use of the terms Métis and Métis Nation is discussed in some detail in Volume 4, Chapter 5.

Following accepted practice and as a general rule, the term *Inuit* replaces the term *Eskimo*. As well, the term *First Nation* replaces the term *Indian*. However, where the subject under discussion is a specific historical or contemporary nation, we use the name of that nation (e.g., Mi’kmaq, Dene, Mohawk). Often more than one spelling is considered acceptable for these nations. We try to use the name preferred by particular nations or communities, many of which now use their traditional names. Where necessary, we add the more familiar or generic name in parentheses – for example, Siksika (Blackfoot).



Terms such as Eskimo and Indian continue to be used in at least three contexts:

1. where such terms are used in quotations from other sources;
2. where Indian or Eskimo is the term used in legislation or policy and hence in discussions concerning such legislation or policy (e.g., the *Indian Act*, the Eskimo Loan Fund); and
3. where the term continues to be used to describe different categories of persons in statistical tables and related discussions, usually involving data from Statistics Canada or the Department of Indian Affairs and Northern Development (e.g., status Indians, registered Indians).



# 1

## INTRODUCTION

IN VOLUME I OF OUR REPORT, we presented an historical overview of the relationship that has developed over the last 400 years between Aboriginal and non-Aboriginal people in Canada. We have seen that it was built on a foundation of false premises – that Canada was for all intents and purposes an unoccupied land when the newcomers arrived from Europe; that the inhabitants were a wild, untutored and ignorant people given to strange customs and ungodly practices; that they would in time, through precept and example, come to appreciate the superior wisdom of the strangers and adopt their ways; or, alternatively, that they would be left behind in the march of progress and survive only as an anthropological footnote.

It was not to be. A country cannot be built on a living lie. We know now, if the original settlers did not, that this country was not *terra nullius* at the time of contact and that the newcomers did not ‘discover’ it in any meaningful sense. We know also that the peoples who lived here had their own systems of law and governance, their own customs, languages and cultures. They were not untutored and ignorant; they were simply cast by the Creator in a different mould, one beyond the experience and comprehension of the new arrivals. They had a different view of the world and their place in it and a different set of norms and values to live by.

Many non-Aboriginal Canadians recognize this today and would like to start afresh. They find it quite understandable that settlers in the early days had difficulty relating to Indigenous peoples – and indeed Indigenous peoples had a similar difficulty relating to them – but they find it impossible to justify the sad history of colonialism that followed. The time has come, they told the Commission in briefs and oral presentations, to put the relationship between Aboriginal and non-Aboriginal peoples on a more secure foundation of mutual

recognition and respect and to plan together a better future for our children and our children's children.

This theme was echoed by many of the Aboriginal people who came to our hearings. Many, it is true, remain bitter and find it hard to put the past behind them. Memories of relocation, residential schools, discrimination and racism keep coming to the surface, causing them to lose heart and wonder whether things will ever change. But Commissioners were left in no doubt that deep down the spirit is still there, along with Aboriginal people's determination to assume their rightful place in a new Canadian society where diversity is not just accepted but welcomed and encouraged, and where Aboriginal peoples are recognized not just as one of the founding peoples but as Canada's First Peoples.

Most Aboriginal people can rise above their circumstances, believing firmly that their destiny is to remain here on the land the Creator set aside for them to care for and protect. Commissioners are persuaded that Aboriginal peoples' deep-seated spirituality explains the miracle of their survival through centuries of adversity and pain. They will assuredly live to see a new day for their children, and they are anxious and impatient to start putting in place the foundations of the new relationship.

In this volume, the Commission addresses what we see as the four basic pillars of the new relationship:

- treaties
- governance
- lands and resources
- economic development

## 1. TREATIES

For a great many people, the centre-piece of any new relationship between Aboriginal and non-Aboriginal people is the inherent right of Aboriginal peoples to self-government. Why then would Commissioners begin with treaties? The explanation is simple. The treaty was the mechanism by which both the French and the British Crown in the early days of contact committed themselves to relationships of peaceful coexistence and non-interference with the Aboriginal nations then in sole occupation of the land. The treaties were entered into on a nation-to-nation basis; that is, in entering into the pre-Confederation treaties, the French and British Crowns recognized the Aboriginal nations as self-governing entities with their own systems of law and governance and agreed to respect them as such. For several centuries, treaties continued to be the traditional method of defining intergovernmental relations between Aboriginal and non-Aboriginal people living side by side on the same land. It continues to be the mechanism preferred by most Aboriginal people today.



Accordingly, in analyzing treaties in Chapter 2 of this volume, we consider them from two different perspectives. We examine the treaties already in existence to see how successful the treaty mechanism has been in creating and maintaining a smooth and mutually satisfying relationship between the parties over time. But we also examine the treaty concept itself to see whether it offers the best way to establish new agreements involving the settlement of land claims and self-government structures. Obviously, these two purposes are related. If Aboriginal peoples did not see merit in the treaty mechanism, they clearly would not wish to adopt it as the basis for their future relations with non-Aboriginal governments.

It will be apparent in Chapter 2 that treaties have had some disadvantages, most arising out of issues of interpretation. Governments have insisted on the written document as embodying the entire agreement between the parties; Aboriginal parties have considered the oral arrangement, whether reflected in the written document or not, as reflecting the true consensus reached by the parties. The courts have favoured the Aboriginal position and have established, through a series of important decisions, the fundamental principles of interpretation that should apply to historical treaties. If these principles were applied to new treaties, having regard to the context of treaty negotiations, Aboriginal people would have good reason to put their faith in the treaty process.

It is indisputable, however, that existing treaties have been honoured by governments more in the breach than in the observance, and this might give Aboriginal parties reason to pause and reconsider the wisdom of using this process. Several recent changes in the Canadian constitution provide some reassurance, however, especially sections 35 and 25 of the *Constitution Act, 1982*, which recognize and affirm existing Aboriginal and treaty rights and protect them against erosion. Rights conferred on Aboriginal parties in new or renewed treaties entered into after 1982 would enjoy the protection of these provisions.

The courts have also enunciated new principles in recent years that Aboriginal parties to treaties can use to their advantage, such as the fiduciary obligations owed by federal and provincial governments to Aboriginal peoples and the fact that any violation of treaty promises would be seen by the courts as calling into question the honour and integrity of the Crown. By and large, therefore, Aboriginal people see more advantages than disadvantages in the treaty process and have told us that this is their preferred way to handle future negotiated settlements.

In effect, what is contemplated in some cases is a renewal of the old treaties to make them meaningful in today's context – not to change their spirit and intent, but to interpret them in a reasonable way in terms of today's realities. In other cases, new treaties will be required to reflect the new relationship between governments and Aboriginal people as a result of modern land claims settlements and negotiated arrangements for Aboriginal self-government, the two

being inextricably intertwined in the view of many Aboriginal people. In either case, the aim will be to establish through negotiation the basis for a new relationship between Aboriginal and non-Aboriginal people based on the principles set out in Volume 1 of our report: mutual recognition, mutual respect, sharing and mutual responsibility.

## 2. GOVERNANCE

For roughly 400 years, Aboriginal people in Canada have been ruled by foreign powers, first by the French and the British and later by Canadians. In the eyes of Aboriginal people, none of these governments had any legitimate authority over them. Why do they say this? They point out that under international law, which is embodied in a series of conventions and covenants to which Canada is a signatory, all peoples have the right of self-determination, and this right includes the right to decide how they will be governed. No government can be imposed upon a people without their consent; this would be a denial of their right of self-determination.

Aboriginal people in Canada say that they never consented to be governed by the French or the British or the government of Canada. Indeed, they were never consulted and had no say in the matter. Nor, they allege, did European powers assert authority over them on any valid grounds. Canada was not uninhabited when the Europeans came, nor was it 'discovered' by them. It has been the homeland of Canada's First Peoples for millennia.

Nor could the newcomers claim title to the land by conquest, for there was no conquest. Early in the contact period the relationship was one of peaceful coexistence and non-interference. It was mainly after Confederation that Canada began to appropriate large tracts of land to house the ever-increasing influx of settlers and that the process of colonization and domination of the Aboriginal population began. No one asked them whether they wanted to be British subjects or Canadian citizens. They were simply herded into small reserves to make way for development and at Confederation were assigned to the exclusive jurisdiction of the Parliament of Canada. It apparently struck no one as strange, and possibly even improper, to hand over control of a whole people to a branch of the new federal government. Such is the perception of Aboriginal people, and in Volume 1 we documented some of the worst features of colonization that ensued.

It is not surprising, therefore, that Aboriginal people are calling for a complete change in their relationship with federal and provincial governments to one that recognizes their inherent right of self-government as distinct peoples and as Canada's First Peoples. The time seems opportune; indeed, the cracks in the existing relationship are coming starkly to the fore all across the country, and it should be apparent by now that trying to preserve the status quo is futile.

It is clear to the Commission that if Aboriginal peoples are to exercise their self-governing powers within the context of Canada's federal system, then federal and provincial governments must make room for this to happen. Instead of being divided between two orders of government, government powers will have to be divided among three orders. This is a major change, and one that will require goodwill, flexibility, co-operation, imagination and courage on the part of all concerned.

Aboriginal people are not a homogeneous group, and it seems unlikely that any one model of self-government will fit all First Nations, Métis people and Inuit. The basic principles, however, should be settled by negotiation; the flexibility should be in their application.

In Chapter 3, the Commission considers a variety of governance models, including models for the increasing number of Aboriginal people living in urban centres. We hope that these models will be helpful in stimulating serious discussion on this very challenging subject.

### 3. LANDS AND RESOURCES

Chapter 4, in Part Two of this volume, is devoted to lands and resources. This is probably one of the most sensitive aspects of the current dialogue, but it is one that must be addressed without equivocation. As interveners told us many times at our public hearings, self-government without the capacity for a broad measure of self-reliance is a recipe for disaster. How true this is. Governments need money to carry out their responsibilities, but Aboriginal nations have limited resources. Their lands and resources were taken from them by the settler society and became the basis for the high standard of living enjoyed by other Canadians over the years. Only a small proportion of Canada's resource income has come back to Aboriginal people, most in the form of transfer payments such as social assistance. This has never been, and is not now, the choice of Aboriginal people. They want to free themselves from the destructive burden of welfare and dependency. But to do this they need to have back some of what was taken away. They need land and they need resources. How are they to get them in a country where almost every acre is spoken for? Most non-Aboriginal Canadians are probably unaware that even the amount of land initially set aside as reserves for Indian peoples has been reduced over the years to the point where just a third of the original remains. The Métis people, with few exceptions, have no land base at all.

One way for Aboriginal peoples to acquire more land and resources is through the land claims process, but in most cases such negotiations have been hamstrung by lack of goodwill, if not lack of good faith, on the part of governments. Claims have dragged on for years, and it is clear that the processes in place are not effective. The Commission has studied these processes and has recommendations to change this situation. One positive step would be to establish an



independent tribunal to monitor both the specific and the comprehensive land claims process.

A tribunal would ensure, among other things, that claims were being dealt with in a timely fashion, that the parties were negotiating in good faith, and that the disputed resources were not being depleted pending the disposition of the claim. The goal would be to ensure that the process was not being abused, that delays were kept to a minimum, and that principles of fundamental justice and fairness were being respected. The Commission is persuaded that without such a supervisory body, land claims negotiations will continue to drag on, to the detriment of only one of the negotiating parties – Aboriginal claimants.

Not all Aboriginal peoples have a land claim, however, and even for those who have, the settlement may fall far short of what is required for self-government. The Commission therefore approached the subject of land from a much broader perspective. Why do Aboriginal peoples want land? What do they need it for? They need lands and resources for self-government, but also for more than that. They need a land base for their people. In Chapter 3, we suggest that the nation, rather than the local community, is the preferred unit of self-government. Each Aboriginal nation would govern its own people and require enough land to accommodate them. Although all members of the nation may not want to live on the nation's land base – where Aboriginal laws, customs, language, identity and culture would prevail under self-government – many will want to do so. There is already a movement afoot among Aboriginal people to recapture their identity and culture, and Aboriginal self-government might be expected to provide further impetus in this direction. Aboriginal nations will need land, in some rough proportion to their numbers (which are on the increase, if current demographic trends persist), on which they are a majority and can maintain and promote their language, identity and culture and live their own way of life. In Chapter 4, we discuss some of the criteria for determining how much land and resources would be required realistically to support Aboriginal self-government in both its aspects – as a cultural homeland and as a viable economic base.

The Commission recognizes, of course, that lands and resources alone will not provide self-sufficiency for Aboriginal governments. We therefore had to consider the potential for economic development.

## 4. ECONOMIC DEVELOPMENT

In Chapter 5, the Commission looks at the immensely difficult problem of how to build a viable economic base in Aboriginal nations and their communities to support self-government. Certainly, a share in the resources of an adequate land base would help, and this has to be part of any treaty renewal process or comprehensive land claims agreement. But by itself it is not enough.



During our public hearings, we visited a cross-section of First Nations, Inuit and Métis communities and saw at first hand the terrible poverty in which many Aboriginal families are living. How could this happen in an affluent country like Canada? We saw also the psychological impact of years of grinding poverty – the sense of helplessness and hopelessness, the low morale, the lack of self-esteem. As one hunter and trapper, who had seen the wildlife habitat destroyed in the name of development, said to us, “How can I hold my head up high when I can’t put bread on the table to feed my family?” How does one respond to a question like that? How will Canada respond?

It is clear that the traditional economies of Aboriginal peoples must be strengthened. Tremendous hardship was inflicted on thousands of Aboriginal families by the anti-fur campaign of the animal rights lobby. Serious threats to traditional economies have also resulted from resource development projects – loss of habitat, mercury pollution, acid rain, and resource depletion through overfishing and clear cutting. The Commission believes that co-jurisdiction and co-management arrangements, where governments and Aboriginal people share responsibility for resource development, would result in less environmental damage and therefore less damage to the traditional economies of Aboriginal peoples.

Thriving, economically viable communities are not going to be created overnight. Aboriginal people recognize that a renewed focus on education and training is of vital importance. The inertia that paralyzes many communities has had a particularly deep impact on young Aboriginal people, causing them to drop out of school at alarming rates and abandon all prospects for a meaningful future. Yet this is the generation that must start to get ready for self-government: they must be the political leaders, the business entrepreneurs, the institution builders, the policy makers, the scientists, technicians and educators. It cannot happen without a massive investment in education and in imaginative and widely implemented approaches to help people acquire job experience. In the Commission’s view, this is part of the mutual and shared responsibility of which we spoke in Volume 1 and a vital aspect of the new relationship.

A significant step in the right direction would be for the federal government to fulfil its treaty promises. Its failure in this regard is a national disgrace. Another step would be for all governments to comply with the equality provisions of the *Canadian Charter of Rights and Freedoms*. We heard a lot about restorative and corrective justice during our mandate but saw very little evidence of it in practice.

Finding employment is often problematic for Aboriginal people. Few job opportunities are available in Aboriginal communities, and in urban centres Aboriginal applicants often face discrimination and racism. Employment equity and affirmative action are positive steps, but they can never completely solve such a large-scale problem. Some 300,000 additional jobs for Aboriginal people need

to be created in the next 20 years if Aboriginal people are to attain the same level of employment as other Canadians enjoy.

Governments are not likely to be able to create these jobs. Creating an environment in which small businesses and an appropriate mix of private and public enterprises can emerge and grow in Aboriginal communities would seem to be a more appropriate role. Aboriginal business development was a recurrent theme during our hearings. At our round table on economic development we heard some remarkable success stories, but we also heard about barriers to success, the main one being difficulty gaining access to capital. In Chapter 5, we review institutional lending policies and suggest how financial institutions might play a greater role in furthering Aboriginal economic self-sufficiency. We also see a role for Aboriginal lending institutions; land claims settlements could provide a funding base for such institutions. Aboriginal people are fully aware that, in addition to supporting traditional economies, new forms of economic activity are required for the future, including resource-based industries, manufacturing and services, if self-sufficiency and self-government are to become a reality.

The messages of Volume 2 of our report are clear:

- The treaty process is the most appropriate vehicle for embodying the new relationship between Aboriginal and non-Aboriginal people in Canada.
- The time is right for Canadians and their governments to recognize the inherent right of Aboriginal peoples to self-government and to make room in the Canadian federation for its exercise.
- A more equitable and just allocation of lands and resources to Aboriginal peoples is a fundamental prerequisite for preserving Aboriginal culture and identity and for the effective operation of Aboriginal self-government.
- An adequate land and resource base by itself is not enough to support self-government: the challenge of Aboriginal economic development must also be met through the combined efforts of Aboriginal and non-Aboriginal people, governments and institutions.

# 2



## TREATIES

When our peoples entered into treaties, there were nations of peoples. And, people always wonder why, what is a nation? Because only nations can enter into treaties. Our peoples, prior to the arrival of the non-indigenous peoples, were under a single political society. They had their own languages. They had their own spiritual beliefs. They had their own political institutions. They had the land base, and they possessed historic continuity on this land base.

Within these structures, they were able to enter into treaties amongst themselves as different tribes, as different nations on this land. In that capacity they entered into treaty with the British people. So, these treaties were entered into on a nation-to-nation basis. That treaty set out for us what our relationship will be with the British Crown and her successive governments.

Regena Crowchild  
President, Indian Association of Alberta  
Edmonton, Alberta, 11 June 1992\*

THE COMMISSION'S TERMS OF REFERENCE required us to investigate and make concrete recommendations concerning

5. The legal status, implementation and future evolution of aboriginal treaties, including modern-day agreements.

An investigation of the historic practices of treaty-making may be undertaken by the Commission, as well as an analysis of treaty imple-

---

\* Transcripts of the Commission hearings are cited with the speaker's name and affiliation, if any, and the location and date of the hearing. See *A Note About Sources* at the beginning of this volume for information about transcripts and other Commission publications.

mentation and interpretation. The Commission may also want to consider mechanisms to ensure that all treaties are honoured in the future.

We were also directed to propose specific solutions, rooted in domestic and international experience.

This part of our mandate is in a sense the most simple to grasp. The treaties constitute promises, and the importance of keeping promises is deeply ingrained in all of us and indeed is common to all cultures and legal systems. Thus our task is, first, to identify the promises contained in the treaties. Then we must make recommendations for fulfilling any treaty promises that remain unfulfilled. This task, though simple to describe, takes us to the heart of our mandate and to the core elements of the relationship between Aboriginal and non-Aboriginal people in Canada.

We begin this volume, which concerns the restructuring of the relationship between Aboriginal and non-Aboriginal people, with an examination of the treaties because it has been through treaty making that relationships between Aboriginal and non-Aboriginal people have traditionally been formalized. In our view, treaties are the key to the future of these relationships as well. In this volume we address substantive issues such as governance, lands and resources, and economic development. Just as those issues were addressed traditionally in the nation-to-nation context of treaties, it is in the making of new treaties and implementation of the existing treaties that these issues can be addressed in a contemporary context.

In Volume 1, we discussed the history of treaty making; now we draw the lessons to be learned from that history. We will also see how the policies of the government of Canada, over time, ignored and marginalized the treaties, despite the continued insistence of treaty nations that the treaties are the key to all aspects of the relationship.<sup>\*</sup> Finally, we will examine the central role of the treaties and treaty processes in fashioning a just and honourable future for Aboriginal peoples within Canada and an equitable reconciliation of the rights and interests of Aboriginal and non-Aboriginal people.

At the same time we must acknowledge that not all the substantive issues in our mandate can be addressed through the making, implementation or renewal of treaties. Treaties, as we will see, are by their nature agreements made by nations. Where there are groups of Aboriginal people who may not meet the criteria for nationhood, some other instrument must be used. The primary theme of this volume nonetheless remains the revitalization of Aboriginal nationhood, a theme discussed in greater detail in Chapter 3.

---

<sup>\*</sup> In this chapter we use the term 'treaty nations' to refer to the Aboriginal parties to treaties with the Crown. We use the term 'Aboriginal nations' to refer to nations of Aboriginal people that have not yet made a treaty with the Crown that addresses their Aboriginal rights and title. We refer to these nations collectively as 'Aboriginal and treaty nations'.



Earlier in our report, we identified four key principles of a renewed relationship: mutual recognition, mutual respect, sharing and mutual responsibility (see Volume 1, Chapter 16). These principles have been present in varying degrees throughout the treaty relationship. Some treaty relationships are very old: they go back to the earliest times of contact between the Aboriginal peoples of the Americas and the first Europeans to arrive here. Some relationships have yet to be formalized by treaty. The four principles provide a framework for understanding and fulfilling the treaties of the past and for making new treaties.

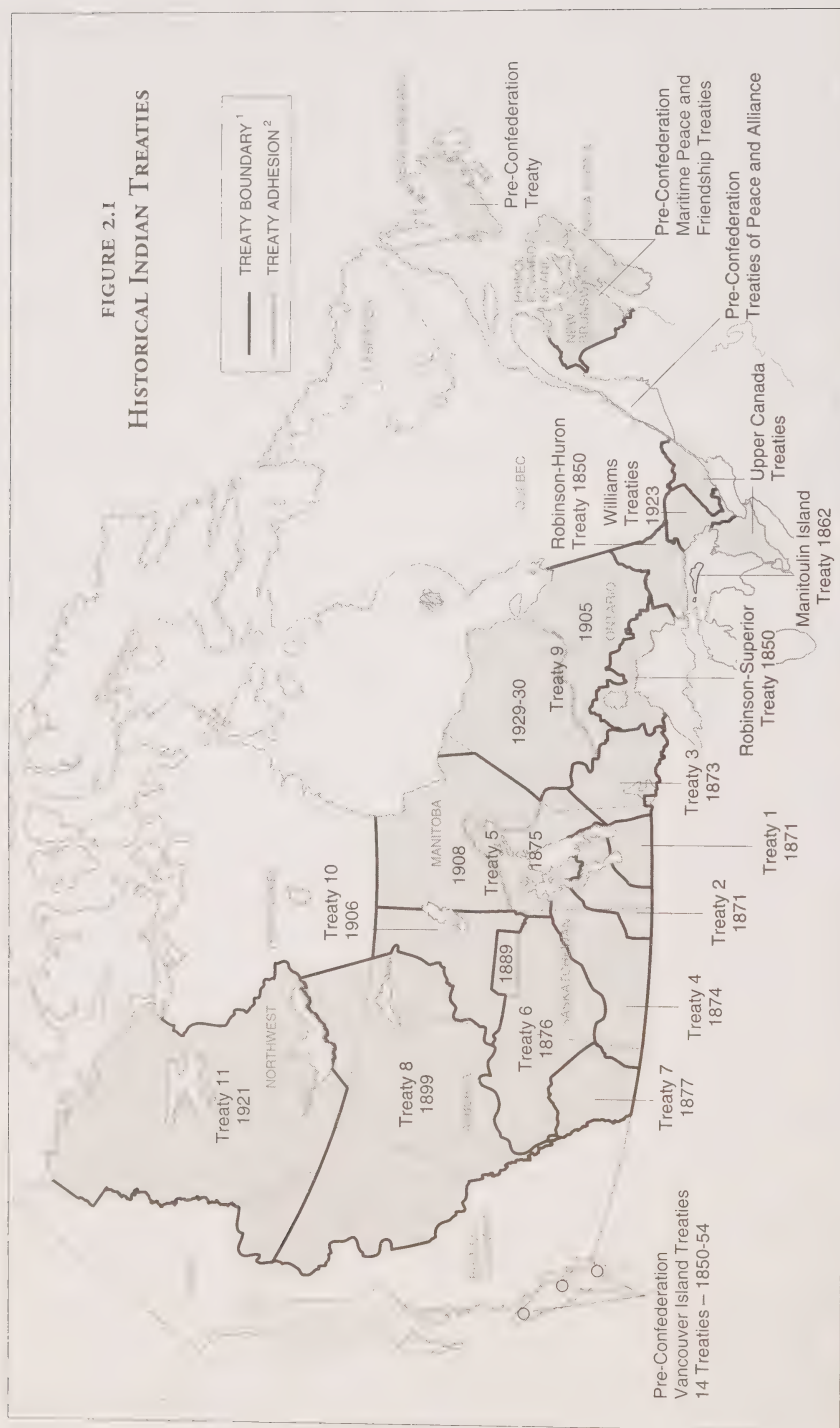
The story of the treaties is, sadly, replete with examples of failed communications, as peoples with vastly different views of the world attempted to make agreements. Those differences denied them a true consensus on many points, leading to frustration and animosity. In Volume 1, we saw that treaty making took place on a common ground of symbolism and ceremony, but contrasting world views led the treaty parties to divergent beliefs about the particulars of the treaties they made.

At the same time we must keep in mind that the very act of entering into treaties – even if the resulting agreements were flawed or incomplete – represented a profound commitment by both parties to the idea of peaceful relations between peoples. The act embodies the principles of respect and sharing that we identified in Volume 1. Just as these principles motivated the participation of the parties to some degree at the time of treaty, so they should now guide the actions of both treaty parties as they seek to establish consensus on the matters that divide them. The treaty mechanism itself provides a sound and appropriate framework for the task ahead. Once made, treaties need to be kept alive, honoured and adapted to changing circumstances.

As we saw in Volume 1, there was a long and rich history of treaty making among the Aboriginal nations of the Americas before the arrival of Europeans. This tradition was expanded to include European powers. The treaties made in the Americas during the past 500 years address matters of governance, lands and resources, and the economic relationship between the parties (see Figure 2.1). The original meaning – or as it is often described, the spirit and intent – of treaties has become obscure, for reasons we will discuss. In this chapter we will propose processes to reinstate the existing treaties to their rightful prominence in defining relationships between peoples.

Treaties were made in the past because the rights of Aboriginal and non-Aboriginal people occupying a common territory could come into conflict unless some means of reconciliation was found. Contemporary Canadian law recognizes Aboriginal rights as being based on practices that are “an integral part of their distinctive culture”.<sup>1</sup> The unique nature of Aboriginal rights, as understood in Canadian law, makes it difficult to fit them into the context of rights and obligations our courts are accustomed to addressing. By entering into treaties, the parties can clarify how these rights should interact with one another.

### FIGURE 2.1 HISTORICAL INDIAN TREATIES



Notes: 1. Treaty boundary lines are approximate.

2. Extension of a treaty boundary as a result of later signatories who adhered to the terms of the original treaty.

*Source:* Information taken from the National Atlas Information Services map sheet number MCR4162 © 1991. Her Majesty the Queen in Right of Canada with permission of Natural Resources Canada.

Treaty making can enable the deepest differences to be set aside in favour of a consensual and peaceful relationship. The parties to a treaty need not surrender their fundamental cultural precepts in order to make an agreement to coexist. They need only communicate their joint desire to live together in peace, to embody in their own laws and institutions respect for each other, and to fulfil their mutual promises.

## 1. A NEED FOR PUBLIC EDUCATION

We have an agreement as treaty Indians and we believe that these treaties cannot be broken or changed or negotiated because a sacred pipe was used when the treaties were signed and sealed.

Nancy Louis  
Samson Cree Nation  
Hobbema, Alberta, 10 June 1992

Prejudice has prevented non-Aboriginal society from recognizing the depth, sophistication and beauty of our culture....But this must change, or there will be immense suffering in the future in this beautiful land which the Creator has bestowed upon us.

Chief Eli Mandamin  
Kenora, Ontario, 28 October 1992

In Volume 5, Chapter 4 we discuss in detail a program of public education on Aboriginal issues. Here we focus on the state of public knowledge about the treaties, which, unfortunately, are poorly understood by most Canadians. We begin by describing two images, both familiar, and both distortions of the meaning of the treaties. The first image is described in the accompanying box.

The Indians arrived in canoes, the chiefs noble and wise and the warriors strong of limb, and they came to the meeting place where officials in black felt hats and black suits and red-coated Mounties were already waiting. The chiefs passed a pipe around, and the officials took it awkwardly as the Mounties and the warriors watched, displaying no emotion. After much talk a paper was brought out, and the noble chiefs and the men in hats made their marks upon it with a formal flourish. The photograph was taken at this moment, and the treaty became an artifact of our history. The black-hatted men and the chiefs had just pledged their undying loyalty to one another under the watchful and sceptical eyes of the red-coated Mounties and the strong-limbed warriors.

As a caption for this image, we offer a quotation from a speech by Prime Minister Trudeau in 1969, commenting on his government's recently announced white paper on Indian policy:

We will recognize treaty rights. We will recognize forms of contract which have been made with the Indian people by the Crown and we will try to bring justice in that area and this will mean that perhaps the treaties shouldn't go on forever. It's inconceivable, I think, that in a given society one section of the society have a treaty with the other section of society. We must all be equal under the laws and we must not sign treaties amongst ourselves.<sup>2</sup>

Prime Minister Trudeau's idea of the treaties, as expressed in the 1969 speech, was that they conferred rights to things such as "so much twine or so much gunpowder", making it easy for him to dismiss them as trivial relics.

The faded photograph of a treaty council is part of our common past as Canadians. It is one of a small number of images in our mental history books, along with the bearded man in a top hat driving in the last spike, the red-coated British soldiers scaling the cliffs before the battle of the Plains of Abraham, and the buck-skinned *coureurs de bois* paddling laden canoes through a land of lakes and forests.

The photograph of the black-hatted officials, the noble chiefs and warriors, and the red-coated watchers has acquired a sepia tone, turning brown with age, and the corners are tattered. The men in the photograph are dead, their living words of mutual loyalty dispersed in the air like the smoke from their pipe, and the promises they made have been superseded by history.

The paper they signed has become their treaty, and the words on the paper speak of the circumstances of a dead past. The words on the paper survive, and it is easy to interpret them narrowly, legalistically, in a manner far removed from the spirit of coexistence prevailing when the treaties were made. In this way treaties can be made to appear trivial, indeed irrelevant, and to the extent that any honour is involved in fulfilling them, token payments of money, twine or gunpowder will suffice.

A second image comes to mind (see accompanying box). The caption for this second image could be the words of Justice Reed of the Supreme Court of the United States, in a decision rendered in 1955:

Every American schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force and that, even when the Indians ceded millions of acres by treaty in return for blankets, food and trinkets, it was not a sale but the conquerors' will that deprived them of their land.<sup>3</sup>

Were the treaties elaborate deceptions perpetrated by a sophisticated civilization upon unsophisticated and unwary Aboriginal peoples? Were the treaties



This image is a caricature, and the Indians are drawn comically, in cartoon style. Their noses are exaggeratedly large and their skin is bright red. The chief's eyes bulge as he ogles the mound of beads and other trinkets that spill out of a chest the man in the black top hat has brought. The top-hatted man holds a deed to Manhattan. Clearly, both the chief and the top-hatted man think the other is crazy.

fraudulent, designed to provide a thin veneer of respectability for transactions that were actually acts of conquest? Were the men in black hats and red coats engaged in an elaborate show? Were their promises of enduring loyalty at best evasions and at worst outright lies?

In this view of history, the chiefs and warriors did not know that they were already a conquered people whose consent to a treaty was a mere formality. They were duped into peace by words of loyalty and trust and refrained from exercising their considerable military power as a result. In this view, the treaty might as well have been an ambush; its effect was the same. In this view, therefore, to continue to respect the treaties is to perpetuate a cruel hoax. Surely it would be preferable to end the pretext that there were ever meaningful treaties and to get on with the job of integrating Indian people into society on the basis of equality and sameness.

The Commission undertook historical and legal research on the treaties on a scale unprecedented in our country's history.<sup>4</sup> We heard at length from First Nations leaders and elders in all parts of the country about the treaties that were made. We heard from Inuit about their land claims agreements, which are modern-day treaties. We heard from the Métis Nation about their hope for a new accord or compact to formalize their relationship with Canada. We heard from leaders and elders of other nations, which were denied the opportunity to make a treaty with the Crown, that they want to do so now, if it can be done upon a proper foundation of mutual respect.

The Canada that takes a proud place among the family of nations was made possible by the treaties. Our defining national characteristics are tolerance, pluralism and democracy. Had it not been for the treaties, these defining myths might well not have taken hold here.<sup>5</sup> Had it not been for the treaties, wars might well have replaced the treaty council. Or the territory might have been absorbed by the union to the south. Canada would have been a very different place if treaty making with the Indian nations had been replaced by the waging of war.

Each of the European nations that came to America to plant a flag and assert imperial pretensions had a particular approach to the people of the continent. The French settled in the St. Lawrence Valley and made such short-term military alliances as were necessary to secure peace and trade. The British



brought the common law, reinvented the Indian treaty on the basis of that law, and used it as their primary tool for relating to the Indian nations. This led to what might be termed a friendlier form of expropriation. Certainly the British honed the process of treaty making for purposes of land cession to a fine art.

In the treaties, the British Crown and the Indian nations pledged undying loyalty to one another. The Crown's honour was pledged to fulfilling solemnly made treaty promises. When these promises were dishonoured, the results were shameful. As Alexis de Tocqueville wrote in 1840, "the conduct of the United States Americans towards the natives was inspired by the most chaste affection for legal formalities.... It is impossible to destroy men with more respect to the laws of humanity."<sup>6</sup> Substitute 'British' or 'Canadians' for 'United States Americans' and the statement remains as valid and as provocative.

Indian treaties bear the strong imprint of the British legal system. Treaties are of course universal means of arranging alliances, enabling disparate peoples to keep the peace, and establishing mutually beneficial arrangements. What the British did uniquely was to establish unilaterally, in the *Royal Proclamation of 1763*, a set of rules to govern treaty making with the Aboriginal peoples of North America. These rules, as Canadian courts have since declared, gave rise to a unique trust-like relationship, which continues to have legal and political effect today.

The British legal system regarded the creation of these rules as an assertion of British sovereignty and dominion over the land occupied by the Aboriginal nations. Courts in Canada have accepted that it is not their role to question the legality of this assertion of authority. Within the boundaries of our mandate, however, the Commission can and does challenge the legitimacy of certain conclusions based on the Crown's assertions, particularly when they call into question the Crown's declared policies of honourable dealing and its legal duty so to deal (see our recommendations in Volume 1, Chapter 16). It is the Commission's duty to examine the Crown's role in making and fulfilling treaties with First Nations and to make recommendations to the Crown in relation to these historical actions.

The view described earlier – that treaties are no more than outdated scraps of paper – has led many Canadians to consider that the specific obligations described in the treaty documents are trivial and can therefore be easily discharged. In this view, treaties are ancient and anachronistic documents with no relevance today. Like Prime Minister Trudeau in 1969, many Canadians still do not understand how, in a modern democratic society, treaties can continue to exist between different parts of society.

The other view – that treaties were weapons in a war fought not by combat but by deception and the systematic dishonouring of the sovereign's solemn pledges – leaves many Canadians puzzled, even appalled, by the prospect of giving renewed effect to treaties made in the distant (or even the recent) past. They react even more strongly to the prospect of making new treaties. There

remains a view among Canadians that old treaty obligations might have to be fulfilled – grudgingly – but that the making of new ones is anathema to a vital and modern nation.

Canadian law and public policy have moved well ahead of these widely shared opinions about treaties. A mere twelve years after his 1969 speech, Prime Minister Trudeau agreed to a constitutional amendment that gave constitutional protection to “existing aboriginal and treaty rights”.<sup>7</sup> By that time the courts had given strong indications that these rights had considerable legal significance. A year after the patriation of the constitution, Prime Minister Trudeau endorsed a further constitutional amendment that recognized the contemporary land claims process as the making of new treaties.<sup>8</sup>

Canadians’ knowledge and understanding of treaties have not kept pace with these changes. Canadians are not taught that Canada was built on the formal treaty alliances that European explorers, military commanders and later civil authorities were able to forge with the nations they encountered on this continent. Today, with increasing awareness of Aboriginal issues, young Canadians may learn more about the treaties than their parents did, but there is still little in the way of teaching material and curriculum development to dispel this ignorance.<sup>9</sup> It is especially unfortunate that the younger members of the treaty nations may be losing a sense of their own history. If, as Justice Reed said, “every schoolboy knows” that the treaties were a sham used to disguise the expropriation of land, then this is the direct result of schoolboys having been misled or at least deprived of the truth about the treaties and about the peoples that made them.

Our discussion of the historical treaties will of necessity be dominated by a discussion of First Nations. Treaties were not generally made with Métis people or Inuit. As a result, this chapter may appear to focus on only one of the three Aboriginal peoples of Canada. Nevertheless the making of treaties in the future can and should be open to all Aboriginal nations that choose a treaty approach. Many of the future treaties may well be termed accords or compacts or simply land claims agreements. But the Commission believes that treaties, by any name, are a key to Canada’s future. We will propose processes to implement and renew the historical treaties, which will involve an examination of the spirit and intent of those treaties. We will also make recommendations to revitalize treaty making for Aboriginal nations that have not yet entered into treaties with the Crown.

We will propose a rethinking of the treaties as a means to secure justice for Aboriginal nations and a reconciliation of their rights with the rights of all Canadians. The result could be a new, satisfying and enduring relationship between the Aboriginal and treaty nations and other Canadians. It is within the treaty processes we propose that our substantive recommendations on matters such as governance, lands and resources, and economic issues will ultimately be addressed.

Treaties need to become a central part of our national identity and mythology. Treaties have the following attributes:

- They were made between the Crown and nations of Aboriginal people, nations that continue to exist and are entitled to respect.
- They were entered into at sacred ceremonies and were intended to be enduring.
- They are fundamental components of the constitution of Canada, analogous to the terms of union under which provinces joined Confederation.
- The fulfilment of the spirit and intent of the treaties is a fundamental test of the honour of the Crown and of Canada.
- Their non-fulfilment casts a shadow over Canada's place of respect in the family of nations.

## 1.1 Treaties are Nation-to-Nation

The treaties created enduring relationships between nations. In Volume 1 (particularly chapters 3 and 5) we discussed the concept of nations of Aboriginal people. As discussed further in Chapter 3 of this volume, the original nations have evolved over time, and barriers to their exercise of nationhood have arisen, but this has not changed their relationship to the Crown.<sup>10</sup> The parties to the treaties must be recognized as nations, not merely as "sections of society".

In entering into treaties with Indian nations in the past, the Crown recognized the nationhood of its treaty partners. Treaty making (whether by means of a treaty, an accord or other kinds of agreements) represents an exercise of the governing and diplomatic powers of the nations involved to recognize and respect one another and to make commitments to a joint future. It does not imply that one nation is being made subject to the other.

As discussed in Volume 1, the nation-to-nation relationship became unbalanced when alliances with Aboriginal nations were no longer needed, the non-Aboriginal population became numerically dominant, and non-Aboriginal governments abandoned the cardinal principles of non-interference and respectful coexistence in favour of policies of confinement and assimilation – in short, when the relationship became a colonial one.

## 1.2 Treaties are Sacred and Enduring

Much was said at our public hearings about the sacred nature of the treaties and their embodiment of spiritual values. As Nancy Louis of the Samson Cree Nation said in the passage quoted earlier in this chapter, the treaty nations regard as sacred compacts the agreements that Prime Minister Trudeau described as "forms of contract". The contrast between these perspectives could not be sharper.

Regardless of how the treaties are perceived, one thing is clear: the parties agreed that they were to be enduring. They were to last "so long as the sun rises



and the river flows.”<sup>11</sup> These are solemn words. They are words with which the Crown pledged its honour. In this chapter we explore the prevalent amnesia about the treaties and why their spirit and intent need to be rediscovered and fulfilled.

Why are treaties with Indian nations different from ordinary contracts or international treaties? Some argue that they are not different. Some maintain that they are fully international in nature while others argue that they are simple contracts. The courts of Canada have described them as neither international nor contractual but as constituting in Canadian law a unique category of agreement or, in the terminology used by the courts, *sui generis*.<sup>12</sup>

Regardless of the legal character of the treaties, the Commission has concluded that the treaties are unique in part because their central feature makes them irrevocable. The central feature of almost all the treaties is to provide for the orderly and peaceful sharing of a land and the establishment of relations of peace and even kinship. Once this has been acted upon, it cannot be reversed. Parties that have made such promises cannot go back to the beginning and annul the agreement, because the treaty has made them interdependent in a way that precludes starting over again as strangers.

Commercial contracts are easily made, then frequently changed or broken. Parties to contracts can resort to the courts, or they can simply change their minds about the contractual relationship. They can pay a penalty or damages, then go their separate ways.

In the realm of international law, treaties are less readily made, but they too are sometimes changed or broken. Nation-states that break off a treaty relationship may continue to have enduring links, but they do not usually find themselves in a state of continuing interdependence as a result of sharing a territory. Except in the rarest of cases, they do not make treaties that obliterate their separate identities and legal personalities or prejudice their exclusive dominion over their territories.

As discussed later in this chapter, the parties to the treaties now have a different perspective on their relationship. The treaty nations maintain that their national identities, their sovereignty and their title were recognized and affirmed by their making of treaties with the Crown. However, they did give up *exclusive* dominion over their territories by consenting to some form of sharing of their territory.

The Crown has traditionally contended that treaty nations, by the act of treaty making, implicitly or explicitly accepted the extinguishment of residual Aboriginal rights and acknowledged the sovereignty and ultimate authority of the Crown, in exchange for the specific rights and benefits recorded in the treaty documents.

Although it can be argued that some treaties, or key parts of them, are void for lack of consensus, they cannot be voided, because the parties to the treaties



are now intertwined and interdependent. For this reason, the treaties must be respected and implemented, however difficult this may prove. As a result, areas of consensus must be built upon, and areas where no consensus was reached at the time the treaty was signed must now become the subject of a process to achieve consensus.

### 1.3 Treaties are Part of the Canadian Constitution

The Commission is of the view that the treaties are constitutional documents, designed to embody the enduring features of the law of the country.

In extensive presentations to the Commission, treaty nation leaders said their nations were sovereign at the time of contact and continue to be so. Such positions are often perceived as a threat to Canada as we know it. The Commission has considered the various views of sovereignty expressed to us and has found no rational way to bridge the gap between those who assert and those who deny the continuing sovereignty of Aboriginal nations (see Chapter 3).

The Commission concludes that any detailed examination of sovereignty is ultimately a distraction from the issues our mandate requires us to address. Differences in deep political beliefs are best dealt with by fashioning a mutually satisfactory and peaceful coexistence rather than attempting to persuade the adherents of opposing positions that their beliefs are misguided.

Treaty making does not require the parties to surrender their deepest beliefs and rights as a precondition for practical arrangements for coexistence. In the international arena, treaties are made by nation-states reflecting the cultural and political diversity of all humanity. The treaties between the treaty nations and the Crown were based on their mutual consent and did not require either nation to surrender its identity and culture. The alternative to treaties was to take the treaty nations' territory by force, an option that was certainly used elsewhere in the Americas.<sup>13</sup> The avoidance of war between Aboriginal nations and the French and British in what is now Canada was a direct consequence of the treaties and the relationships created by them.

The network of treaties between the Crown and treaty nations is described by some as confederal in nature.<sup>14</sup> Treaty rights are now recognized and affirmed by section 35(1) of the *Constitution Act, 1982*. The Commission considers that the treaties do indeed form part of the constitution of Canada. When properly understood, the treaties set out the terms under which the treaty nations agreed to align themselves with the Crown. Most treaty nation members who appeared before the Commission denied that their nations became mere subjects as a result of their treaties, but made it clear that a political and a spiritual relationship of enduring significance was created.

The Commission concludes that the treaties describe social contracts that have enduring significance and that as a result form part of the fundamental law

of the land. In this sense they are like the terms of union whereby former British colonies entered Confederation as provinces.

## 1.4 Fulfilment of the Treaties is Fundamental to Canada's Honour

Canada holds a unique place among the nations of the world, considered a model of democratic ideals, pluralism, and respect for individual and group rights, which coexist in a rare and precious balance. The weak spot in Canada's international reputation, however, is that we have not honoured our obligations to Aboriginal peoples, a situation that has often been the subject of critical comment from international human rights bodies.<sup>15</sup>

Canadians also recognize that Aboriginal peoples have been treated unjustly; many have a sense of unease about this part of Canada's history. Unfortunately, many Canadians believe that it is too late to remedy these injustices. There is a genuine fear that the cost of justice might be too high.

The Commission believes, however, that a just and fair fulfilment of the treaties is fundamental to preserving Canada's honour in the eyes of the world and in the eyes of Canadians themselves.

We want to engage Canadians in a vision of treaty fulfilment that has three elements. First, we need to achieve *justice* within the separate treaty relationships by implementing those provisions of the treaties that are set out clearly in legal documents. Second, *reconciliation* must be achieved between the spirit and intent of the treaties and the rights of Canadians as a whole. Oral representations and assurances that preceded treaty signings cannot be ignored or divorced from the written text. They are part of the spirit and intent of the treaties. We believe that the purpose of the treaties was to achieve a *modus vivendi*, a working arrangement that would enable peoples who started out as strangers to live together as neighbours. The third element is to *extend* the treaty relationship to all Aboriginal nations in Canada.

Before we can discuss justice in a meaningful way, however, we must overcome ignorance about the treaties. Attitudes arising from ignorance need to be altered through public education. We must engage in an open examination of the costs that drain the public purse and the public spirit alike, and against this we must begin to measure the gains offered by a new relationship.

A program of public education about the spirit and intent of the treaties should include the development of curriculum and teaching materials. It should also include films, plays, and novels to tell the stories of the treaties.

The three main audiences for a program of education are the Canadian public at large, the youth of the Aboriginal and treaty nations, and the public servants responsible for implementing the Crown's treaty obligations.

## RECOMMENDATION

The Commission recommends that

### Public Education 2.2.1

Federal, provincial and territorial governments provide programs of public education about the treaties to promote public understanding of the following concepts:

- (a) Treaties were made, and continue to be made, by Aboriginal nations on a nation-to-nation basis, and those nations continue to exist and deserve respect as nations.
- (b) Historical treaties were meant by all parties to be sacred and enduring and to be spiritual as well as legal undertakings.
- (c) Treaties with Aboriginal nations are fundamental components of the constitution of Canada, analogous to the terms of union whereby provinces joined Confederation.
- (d) Fulfilment of the treaties, including the spirit and intent of the historical treaties, is a test of Canada's honour and of its place of respect in the family of nations.
- (e) Treaties embody the principles of the relationship between the Crown and the Aboriginal nations that made them or that will make them in the future.

## 2. LEGAL CONTEXT OF THE TREATY RELATIONSHIP

The non-Indian governments began to say, "What treaties? You have no treaties." They did not terminate the treaties. They did not restrict the treaties. They just forgot about the treaties and our claim to the land, our land. This is our land as promised by your law. Treaties are the law. They are even in Canada's highest law, the constitution.

Chief Albert Levi  
Migmag First Nation at Big Cove  
Big Cove, New Brunswick, 20 May 1992

For many decades, Canadian courts struggled with the legal character of treaties with Aboriginal nations. Were they contracts? If so, they were certainly very different from ordinary commercial contracts in their subject matter, parties and open-endedness.<sup>16</sup> Were they treaties as understood in international law? If so,

how did they acquire any legal force in Canadian law in the absence of implementing legislation, as is required to give force to international treaties?<sup>17</sup> These questions became the subject of numerous court cases, particularly in the 1980s, that helped to shape the legal context for treaties today.

In 1985, the Supreme Court of Canada concluded in *Simon v. The Queen* that treaties were neither contracts nor international instruments. In Canadian law, they were now to be regarded as agreements *sui generis*. Mr. Simon was a Mi'kmaq who defended himself against a charge of unlawful possession of a rifle and ammunition by referring to hunting rights secured by a 1752 treaty between the Crown and the Mi'kmaq. The Crown, in prosecuting the case, relied on international law on treaty termination to argue that hostilities subsequent to the treaty had terminated it. The Supreme Court of Canada, which eventually heard the case, reached this conclusion:

While it may be helpful in some instances to analogize the principles of international treaty law to Indian treaties, these principles are not determinative. An Indian treaty is unique; it is an agreement *sui generis* which is neither created nor terminated according to the rules of international law.<sup>18</sup>

In adopting this as our starting point, we do not intend to diminish the views of those who see the nature of the treaties differently. We acknowledge the view of many members of treaty nations that the treaties are international in nature. The Supreme Court has stated that, under the laws of Canada, the principles of international law can be helpful, at least by way of analogy, in interpreting the treaties.

The international law of treaties was codified in the 1969 *Vienna Convention on the Law of Treaties*.<sup>19</sup> As the decision in *Simon* suggests, the principles of this body of law can be used by analogy, although no court (other than the Supreme Court of Canada in *Horse*, discussed later in this chapter) appears to have resorted to international law to interpret a treaty since then. In *Simon* the international law relating to the termination of peace treaties was held not to apply. This result was to the benefit of the treaty nations, which sought to rely on the continued existence of the 1752 treaty with respect to hunting rights.

By the time of the *Simon* decision in 1985, section 35(1) of the *Constitution Act, 1982* had come into force and had given a new legal stature to existing treaty rights. Recent cases had affirmed that a generous and liberal approach to interpreting treaties is required. The classic statement is found in the following passage from the 1983 decision in *Nowegijick*:

It seems to me, however, that treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians.<sup>20</sup>



The 1990 *Sioui* decision provided the following succinct description of a treaty:

What characterizes a treaty is the intention to create obligations, the presence of mutually binding obligations and a certain measure of solemnity.<sup>21</sup>

The *Sioui* case involved a safe conduct document, issued in 1760, which the courts held to be a treaty between the Huron nation and the Crown. The Supreme Court made it clear that the relationship between the Huron and the Crown at that time was at least partly nation-to-nation:

At the time with which we are concerned relations with Indian tribes fell somewhere between the kind of relations conducted between sovereign states and the relations that such states had with their own citizens.<sup>22</sup>

In 1991, the Supreme Court observed in the *Bear Island Foundation* case that the fulfilment of treaty rights involved the fiduciary duty of the Crown.<sup>23</sup> The landmark decision in *Sparrow* elaborated further on the nature of the relationship between Aboriginal peoples and the Crown, although it did not involve treaties directly.<sup>24</sup> In *Sparrow*, the context was the effect of section 35(1) of the *Constitution Act, 1982* on an Aboriginal right to fish. A unanimous Supreme Court, interpreting the section for the first time, found that its words "incorporate the fiduciary relationship referred to earlier and so import some restraint on the exercise of sovereign power."<sup>25</sup>

The court quoted with approval the Ontario Court of Appeal decision in *R. v. Taylor and Williams*:

In approaching the terms of a treaty quite apart from the other considerations already noted, the honour of the Crown is always involved and no appearance of 'sharp dealing' should be sanctioned.<sup>26</sup>

Based in part on this conclusion, the court described a general guiding principle for section 35(1) and generally for the future relationship between the Crown and Aboriginal peoples:

That is, the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.<sup>27</sup>

In other words, the government cannot treat Aboriginal people as if they were adversaries. On the contrary, it must be mindful of the trust-like relationship with

them and recognize and protect their Aboriginal rights as a trustee would protect them.

Canadian law thus provides a workable framework within which to begin to assess the status of the treaties and the special relationship they create. One of the problems to which the treaties give rise, however, is interpretation. Canadian law contains complex evidentiary rules developed to address the interpretation of contracts between parties with equal bargaining power (and presumably sharing a common culture, language, laws and means of recording promises).

In considering the interpretation of treaties, Associate Chief Justice MacKinnon of the Ontario Court of Appeal had this to say in *Taylor and Williams*:

Cases on Indian or aboriginal rights can never be determined in a vacuum. It is of importance to consider the history and oral traditions of the tribes concerned, and the surrounding circumstances at the time of the treaty, relied on by both parties, in determining the treaty's effect. Although it is not possible to remedy all of what we now perceive as past wrongs in view of the passage of time, nevertheless it is essential and in keeping with established and accepted principles that the courts not create, by a remote, isolated current view of past events, new grievances.<sup>28</sup>

The judge went on to set out a number of factors to guide the interpretation of treaties, which were subsequently approved by the Supreme Court of Canada in *Sioui*. Justice Lamer said in *Sioui*, without purporting to be definitive on the subject, that these factors were "just as useful in determining the existence of a treaty as in interpreting it".

In particular, they assist in determining the intent of the parties to enter into a treaty. Among those factors are:

1. continuous exercise of a right in the past and at present;
2. the reasons why the Crown made a commitment;
3. the situation prevailing at the time the document was signed;
4. evidence of relations of mutual respect and esteem between the negotiators; and
5. the subsequent conduct of the parties.<sup>29</sup>

Justice Lamer added that "once a valid treaty is found to exist, that treaty must in turn be given a just, broad and liberal construction". He noted that U.S. law on treaties is just as relevant in considering treaty interpretation in Canada and that this principle "for which there is ample precedent was recently reaffirmed

in *Simon*". He then adopted the 1899 U.S. Supreme Court decision in *Jones v. Meehan*.<sup>30</sup>

It must always...be borne in mind that the negotiations for the treaty are conducted, on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by an interpreter employed by themselves; that the treaty is drawn up by them and in their own language; that the Indians, on the other hand, are a weak and dependent people, who have no written language and are wholly unfamiliar with all forms of legal expression, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States; and that the treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians.

Justice Lamer went on to say:

The Indian people are today much better versed in the art of negotiation with public authorities than they were when the United States Supreme Court handed down its decision in *Jones*. As the document in question was signed over a hundred years before that decision, these considerations argue all the more strongly for the courts to adopt a generous and liberal approach.<sup>31</sup>

The *Jones* case uses some of the pejorative language of another era, and most Aboriginal people would reject the description of their ancestors as "weak and dependent" when the treaties were negotiated.<sup>32</sup>

Recent cases have turned the *Sioui* decision around, concluding that signatories of more recent treaties should not benefit from special rules of interpretation because of their growing sophistication in matters of negotiation. In *R. v. Howard*, involving a treaty that ceded Aboriginal title to parts of southern Ontario, the Supreme Court of Canada held as follows:

The 1923 Treaty does not raise the same concerns as treaties signed in the more distant past or in more remote territories where one can legitimately question the understanding of the Indian parties. The 1923 Treaty concerned lands in close proximity to the urbanized Ontario of the day. The Hiawatha signatories were businessmen, a civil servant and all were literate. In short, they were active participants in the economy and society of their province. The terms of the Treaty and specifically the basket clause are entirely clear and would have been understood by the seven signatories.<sup>33</sup>

In *Eastmain Band v. Canada*, the Federal Court of Appeal took a similar approach to interpreting the 1975 James Bay and Northern Quebec Agreement. The court said that

while the interpretation of agreements entered into with the Aboriginals in circumstances such as those which prevailed in 1975 must be generous, it must also be realistic, reflect a reasonable analysis of the intention and interests of all the parties who signed it and take into account the historical and legal context out of which it developed.<sup>34</sup>

The courts continue to grapple with the interpretive difficulties of the treaties. The facts of each case must govern their approach, but the evolving law on the special fiduciary relationship between the Crown and Aboriginal peoples will also continue to guide the courts. Each treaty is unique in time and circumstances. No single formula can be expected to settle the interpretation of such a diverse group of agreements.

To bring some clarity to our analysis of the jurisprudence, we refer to treaties that should benefit fully from the interpretive approach described in the *Sioui* case as historical treaties. Treaties to which these interpretive principles may not apply, such as the *Howard* and *Eastmain* cases, we refer to as modern treaties.

We do not suggest that there is a sharp dividing line between these classes of agreements. The historical context of the relationship between Aboriginal and non-Aboriginal people is relevant to all treaties, as is the general fiduciary relationship between Aboriginal peoples and the Crown described in *Sparrow*. The treaties made before the twentieth century are clearly historical, as are the numbered treaties made in relatively remote parts of Canada early in this century (Treaties 8, 9, 10 and 11). Treaties made in 1975 and later can be characterized as modern. However, each treaty is unique, and as the courts have said, the factual context of each treaty must be considered when approaching issues of interpretation.

Indeed, if the logic of the court decisions is accepted, it might be said that the written text of an historical treaty is but one piece of evidence to be considered with others in determining its true meaning and effect. It seems illogical to recognize the two-sided nature of treaty negotiations but to conclude that the one-sided technical language recorded by the Crown is the whole treaty.

On the other hand, such an approach may be difficult to follow in light of the 1988 decision in *R. v. Horse*, in which the Supreme Court considered the admissibility of a transcript of the treaty negotiations to support an argument that the treaty was intended to guarantee the Indians a right of access to occupied private lands surrendered under the treaty. Justice Estey said:

I have some reservations about the use of this material as an aid to interpreting the terms of Treaty No. 6. In my view the terms are not ambiguous. The normal rule with respect to interpretation of con-



tractual documents is that extrinsic evidence is not to be used in the absence of ambiguity; nor can it be invoked where the result would be to alter the terms of a document by adding to or subtracting from the written agreement.

The court went on to quote a classic statement of the parol (or oral) evidence rule:

Extrinsic evidence is generally inadmissible when it would, if accepted, have the effect of adding to, varying or contradicting the terms of a judicial record, a transaction required by law to be in writing, or a document constituting a valid and effective contract or other transaction. Most judicial statements of the rule are concerned with its application to contracts, and one of the best known is that of Lord Morris who regarded it to be indisputable that:

Parol testimony cannot be received to contradict, vary, add to or subtract from the terms of a written contract or the terms in which the parties have deliberately agreed to record any part of their contract. [*Bank of Australasia v. Palmer*, [1897] A.C. 540, at 545]<sup>35</sup>

Justice Estey noted that the parol evidence rule he relied on had its analogy in the approaches to the construction of Indian treaties. He quoted the *Nowegijick* case as well as *Jones v. Meehan*. Justice Estey nevertheless held that there was "no ambiguity which would bring in extraneous interpretive material."<sup>36</sup>

But what if the written version of the treaty was inaccurate or did not capture the understanding of the Indian parties? In *Sioui*, Justice Lamer referred to what Justice Bisson of the Quebec Court of Appeal had concluded, based on the opening words of the document in question (which was not signed by the Hurons): "the Hurons did not know how to write and the choice of words only makes it clear that the document of September 5, 1760 recorded an oral treaty."<sup>37</sup> It is well known that the numbered treaties were 'signed' by chiefs who did not read or write and were asked to make their marks or to touch a pen. Without question, the chiefs saw this as a formality that was of great significance to the Crown. But can this formality make the Crown's memorandum of the oral agreement the exclusive evidence of its content?

In an influential article (referred to in *Sparrow*), Brian Slattery encapsulated the basic problem:

The written texts of these treaties must be read with a critical eye. Usually, they were accompanied by extensive oral exchanges, which may have constituted the true agreement. The written version was translated orally to the Indian in a process that allowed ample opportunity for misunderstanding and distortion.<sup>38</sup>

Looked at from a purely common-sense perspective, for the Indian parties who did not have the ability to read and write, the real treaty was very likely the oral agreement. The paper document may have been perceived as having the same importance to the Crown's representatives as the ceremonial exchanges of wampum and the smoking of tobacco (to signify the solemnity and finality of the agreement) had to the Indian parties; but the legal document could not have been considered the agreement itself.

The *Horse* case might now be reassessed in light of the principles of *Sparrow*. In particular, courts faced with interpreting treaties in the post-*Sparrow* era might consider what effect the *sui generis* nature of the relationship created by the treaties has on the evidentiary rules applicable to their interpretation. In *Sparrow* the court said that the relationship is trust-like and non-adversarial. Does this preclude the Crown from asserting that the written text is the whole treaty and that no oral evidence should be admitted to show otherwise?

The law of contracts does not appear to be bound as rigidly to the written word as the authorities discussed in *Horse* might suggest. In his leading text on the law of contracts, Waddams discusses the difficulty of applying the parol evidence rule to a world in which standard wording and pre-printed contracts are widely used:

If in all cases where documents were signed the signer had read and fully understood and intended to assent to the contents, the parol evidence rule would be widely applicable. In modern times, however, the growth in the use of standard form printed documents has greatly increased the number of cases where documents are signed without being understood or even read. Everyone knows this – even the judges now openly say it. *Clearly then the party seeking to rely on the document can often be held to know that it was unread. And if that party knows or has reason to know that it does not represent the intention of the signer the document should not be enforced.*

There is nothing very radical in this proposition. It springs naturally from the notion that the law of contracts exists to protect reasonable expectations.<sup>39</sup>

It may appear somewhat farfetched to apply a comment about contemporary pre-printed business forms to the negotiation of treaties in the 1800s. The common issue in both situations, however, is whether the parties had reasonable expectations that a written document expressed their mutual intentions. In both cases, there can be considerable doubt, and in both cases, if it can be shown that the written document does not embody a true consensus on its terms, it should not be treated as the exclusive record of the agreement. The hard work of ascertaining whether a true consensus was reached must then be undertaken.

In some cases, as we will discuss, the parties may not in fact have reached consensus on some important points.

In the 1984 case *R. v. Bartleman*, Justice Lambert of the British Columbia Court of Appeal wrote:

There are many common law rules about the importance that is to be attached to the text of an agreement that has been reduced to writing. But where the text of the agreement was created by one party long after the agreement was made, and where the text is written in a language that only one party can understand, I do not think that any of those rules relating to textual interpretation can have any application.<sup>40</sup>

In that case, the treaty text was produced well after the meeting and the 'signatures' of the chiefs were "crosses on the document [that] were not put there by the Indians."<sup>41</sup>

As the *Bartleman* decision suggests, it does not appear necessary to reject *all* common law rules applicable to written contracts to achieve a fair approach to interpretation, once it is recognized that most treaties, like many pre-printed contractual forms today, were contracts of adhesion. An adhesion contract is defined by *Black's Law Dictionary* as follows:

Standardized contract form offered to consumers of goods and services on essentially "take it or leave it" basis without affording consumer realistic opportunity to bargain and under such conditions that consumer cannot obtain desired product or services except by acquiescing in contract. Recognizing that these contracts are not the result of traditionally "bargained" contracts, the trend is to relieve parties from onerous conditions imposed by such contracts. However, not every such contract is unconscionable.<sup>42</sup>

In other words, they are 'agreements' recorded by one party that do not necessarily reflect the real consent of the other. The law's traditional respect for the written word must give way to the reality of the situation and an honest assessment of the historical context. The cross-cultural process of treaty making makes these concerns much greater in the case of Indian treaties than in the world of contemporary commerce, where most participants are literate.

In the Commission's view, to ignore these factors is to deny the treaties their *sui generis* character in Canadian law and indeed to deny the very reasons that they are *sui generis*. In *Horseman v. The Queen*, Justice Wilson wrote:

The interpretive principles developed in *Nowegijick* and *Simon* recognize that Indian treaties are *sui generis*....These treaties were the product of negotiation between very different cultures and the lan-

guage used in them probably does not reflect, and should not be expected to reflect, with total accuracy each party's understanding of their effect at the time they were entered into. This is why the courts must be especially sensitive to the broader historical context in which such treaties were negotiated. They must be prepared to look at that historical context in order to ensure that they reach a proper understanding of the meaning that particular treaties held for their signatories at the time.

Later in the judgement, this conclusion is reached:

In other words, to put it simply, Indian treaties must be given the effect the signatories obviously intended them to have at the time they were entered into even if they do not comply with today's formal requirements. Nor should they be undermined by the application of the interpretive rules we apply today to contracts entered into by parties of equal bargaining power.<sup>43</sup>

The law of Canada, in summary, has strained to acknowledge the unique character of the treaties. It has recognized the uniqueness of the relationship between the parties to the treaties, and it has acknowledged the unique nature of Aboriginal title. But by nature the law is an inconsistent and politically inappropriate vehicle for resolving the deepest issues of treaty fulfilment.

Not surprisingly, the Canadian law applied to treaties is suffused with the values and assumptions of imperial treaty makers. The written text of the treaty document, for example, is given precedence over oral traditions (although there is somewhat grudging acknowledgement of the oral tradition). In *Horse*, the Supreme Court of Canada said that unless there is ambiguity in the text drafted by the Crown's draftsman, the courts cannot go outside the document for additional evidence about the true intentions of the parties. The courts have sometimes tried to avoid the rigours of this rule, but the rule remains in place, reflecting a highly literal approach to treaty interpretation.

Treaties are often up for interpretation in court cases, but usually in a narrow and ultimately frustrating context. Often the question at issue is whether an Indian person whose First Nation is party to a treaty has a defence to a charge of hunting or fishing out of season. The variations on the facts are endless, but the pattern is common. Treaties often do provide for such a defence. However, the context does not invite a broad look at what the treaty was all about from the perspective of the First Nation party. The court is asked to decide the very narrow question of whether the accused has a treaty right to hunt or fish. The courts seldom have an opportunity to address more fundamental but controversial treaty questions such as whether the treaty nation's Aboriginal title to its traditional territories was effectively extinguished.



This is one of the central issues raised by treaties. What if the two parties had completely different concepts of the agreement each believed had been reached? What if there never was agreement at all? The normal law of contracts specifies that a valid contract requires two elements: the first is the required formality, in the form of a seal or consideration passing between the parties (consideration meaning simply the exchange of something of value). The second element is *consensus ad idem*. This means that the parties must actually have reached a meeting of the minds, that is, an agreement.

In commercial contracts, it can seldom be said that the parties did not have a meeting of minds about a sale of land, a car, shares or commodities. Usually, one party is purchasing something from the other for a price; both sides know what is being purchased and at what price.

Many of the treaties with which we are concerned were made with one of the parties (the Crown) believing that the central feature of the treaty was the purchase or extinguishment of the other party's Aboriginal title, while the very idea of selling or extinguishing their land rights was beyond the contemplation of the Aboriginal party, because of the nature of their relationship to the land. To date, *Paulette* has been the only case in which a direct discussion of this issue was even approached.

At least one court has expressed the view that if a treaty were approached from the perspective of contract law, it might be found invalid. In *R. v. Batisse*, the court said, in relation to the negotiation of Treaty 9 in 1905-1906:

As a result, approximately 90,000 square miles of resource-rich land was acquired by the Crown, free of any beneficial Indian interest, for an absurdly low consideration (even for that time). It is still not clear whether Indian treaties are to be considered basically as private contracts or as international agreements. If the former, then the very validity of this treaty might very well be questioned on the basis of undue influence as well as other grounds.<sup>44</sup>

Other courts have drawn a similar link between treaties and contracts. For example, in *R. v. Tennisco*, the Ontario Supreme Court observed about the formation of an Indian treaty:

In its simplest form the treaty must of necessity consist of an agreement or settlement arrived at between two or more parties with all of the elements of a valid contract. To be a treaty, the provisions of the agreement or settlement, at the very least, must be capable of enforcement during the life of the instrument at the instance of both parties.<sup>45</sup>

If the Indian treaties were contracts, conventional legal analysis might indicate that many of them are void because of the absence of *consensus ad idem*. The

law of contracts then suggests that the parties would return to their original positions, as if the contract had not been made. The problem is apparent. After 100 years of relying on a treaty that has been assumed to be about extinguishment, the parties cannot turn back the clock and begin again.

The legal characterization of the treaties as *sui generis* is a powerful conclusion with powerful implications in law. On one hand, terming the treaties *sui generis* is legally liberating. It means that special rules of law can be developed to address the unique nature of the treaties. On the other hand, though, it might be interpreted to mean that some of the basic protections of contract law do not apply if they would otherwise challenge the extinguishment of Aboriginal title.

Courts have been eager to find that Indian treaties are valid, although they are also willing to find that they have been breached. In *Simon*, the possible application of fundamental breach to the treaties was referred to by Chief Justice Dickson:

It may be that under certain circumstances a treaty could be terminated by the breach of one of its fundamental provisions. It is not necessary to decide this issue in the case at bar since the evidentiary requirements for proving such a termination have not been met.<sup>46</sup>

Similarly, article 60 (1) of the Vienna Convention entitles a party to a treaty to terminate it or suspend its operation in whole or part where the other party is in “material breach.”<sup>47</sup>

When applied to the treaties, the doctrine of fundamental breach appears tailor-made for numerous situations. A recent example is the Supreme Court of Canada decision in *Bear Island*.<sup>48</sup> This case involved an assertion by the Tem-Augama Anishinabai (Deep Water People, in Ojibwa) that they had Aboriginal title to some 4,000 square miles of land in the Temagami area in northeastern Ontario, an area of exceptional beauty, dotted by clear-cut logging and tourist businesses in an uneasy balance. The litigation began in the early 1970s and ended with a judgement of the Supreme Court of Canada in the summer of 1991.

The *Bear Island* case is worthy of special study on many levels. It is a saga of nearly 20 years of argument before the courts. It is an object lesson to many Aboriginal leaders who want to place their people’s most important rights before a court. The judgement of the trial court, released in late 1984, found that there were no Aboriginal rights at all. It discussed the evidence of individual families and their trapping areas in great detail. There was a treaty, but the case was not framed so as to require the court to address any entitlement under the treaty.

By the time the Supreme Court released its decision, it was 1991, nearly seven years later. The court concluded that the trial judge was wrong and added that, on the basis of the facts as the trial judge found them, there had been “an aboriginal right” but that some “arrangements” made sometime after the treaty amounted to an adhesion to the treaty. This extinguished the Aboriginal rights of the Teme-

Augama Anishinabai. The Supreme Court remarked that there was agreement that some of the treaty rights had not been fulfilled. The fulfilment of these rights, the court indicated, involved the fiduciary obligations of the Crown.

The Ontario Court of Appeal had even gone so far as to conclude that the Robinson-Huron Treaty had the effect of unilaterally extinguishing the Aboriginal title of the Teme-Augama Anishinabai because the Crown had formed the intention to extinguish that title, and the ratification of what was in form an agreement was equally capable of being a unilateral act of extinguishment by the sovereign.<sup>49</sup>

If the facts of the treaty adhesion found to have occurred were looked at from the perspective of ordinary contract law, another legal doctrine would certainly have raised its head – that of fundamental breach. The Teme-Augama Anishinabai were said to have exchanged their Aboriginal rights for two main rights: the right to annuities and the right to a reserve of reasonable size. A major component of the treaty – and probably the most fundamental one – remained unfulfilled. A small reserve was created in the late 1940s, 60 years after the adhesion. The balance of the land entitlement remains unfulfilled, however, more than 100 years after the adhesion.

*Bear Island* suggests that the validity of a treaty purporting to extinguish Aboriginal rights will seldom be questioned. It may be that the treaty rights of the First Nation have not been recognized or implemented, but this cannot call into question the cession of land. In the eyes of the law, the Crown can be compelled to live up to commitments under the treaties, but the extinguishment has validity no matter how poorly the Crown subsequently fulfilled its obligations.

The Commission believes that cases such as *Bear Island* place an inappropriate burden on the courts. It is beyond the normal duty of the courts to rule on the validity of instruments that have been relied upon for generations, even centuries. It is natural for a court to leave such instruments intact, rather than set them aside, and simply provide for compensation if the Crown has breached its duty. The Supreme Court has never been asked to rule on the validity of a treaty when there is compelling evidence that the written text deviated from the treaty nation's understanding.

Indian treaties now have the following attributes in Canadian law:

- They are agreements sui generis, neither mere contracts nor treaties in international law.
- They were entered into by one party – the Crown – that owed a fiduciary duty to the other party – the treaty nation.
- The honour of the Crown is always involved in treaties' formation and fulfilment.
- Historical treaties are to be given a large and liberal interpretation in light of the understanding of the Aboriginal party at the time of entering into the treaty.

- While modern treaties may not benefit from the same rules of interpretation as apply to the historical treaties, the courts have not yet explored the impact of the *Sparrow* decision on their interpretation, particularly their *sui generis* nature and the Crown's fiduciary duty.

The Commission believes that the unique nature of the historical treaties requires special rules to give effect to the treaty nations' understanding of the treaties. Such an approach to the content of the treaties would require, as a first step, the rejection of the idea that the written text is the exclusive record of the treaty.

The basic question we posed earlier still lingers: what if there was no agreement at all? One party thought it was purchasing land; the other thought it was agreeing to share its territory. This goes beyond the limits of legal analysis and into the grey area of contact between two alien societies entering treaty, signifying something very important to both of them, but perhaps something very different to each of them. Questions of Aboriginal and treaty rights are different in many ways from the issues courts normally decide, and one might wonder whether they are inherently unsuitable for disposition by the courts ('non-justiciable').

The Supreme Court of Canada has consistently reaffirmed, however, in every important decision on Aboriginal or treaty rights since at least 1973, that these are in fact justiciable issues. In *Calder*, *Guerin*, *Simon*, *Sioui* and other cases, arguments have been made that the issues before the court could not or should not be addressed by judges. Until the 1984 *Guerin* case, the Crown's fiduciary responsibilities were described as a non-justiciable "political trust". Aboriginal and treaty rights were described as having been "superseded by law". Until *Sparrow*, the regulation of Aboriginal rights to fish was said to have extinguished those rights.

The Supreme Court of Canada, for the most part consistently, has made it clear that Aboriginal and treaty rights are part of the legal regime that defines the rule of law in Canada. These court decisions have come slowly, erratically, and at great cost to Aboriginal people. They are also built on a jurisprudential foundation that did not have the benefit of the Aboriginal perspective on key issues.<sup>50</sup> Whatever the shortcomings of the legal system that considered these rights, they are clearly not historical anomalies; nor are they mere constructs of policy. They are part of the bedrock of our law, and they paved the way for our pluralistic society.

They have also contributed, however, to an increase in tensions between the treaty parties. Court proceedings simply do not foster reconciliation. They create winners and losers. Those who lose an argument in court do not always accept it, particularly if they regard the process or the result as illegitimate. This applies equally to treaty nations people and to segments of the non-Aboriginal population. For this reason, we see a need for treaty nations, the institutions of



the Crown and the Canadian public to engage in a process of mutual understanding and respect that is not driven by successes or failures in court.

When the courts arrive at the limits of legal analysis and the law as legitimate tools for determining rights, they will be compelled to recommend a negotiated political settlement based on such rights as they have found to exist. Courts can describe rights. They cannot make a relationship based on those rights work. At some point we may have to stop looking to the courts for assistance. An eloquent plea to this effect is found in the judgement of Justice Lambert of the British Columbia Court of Appeal in the *Delgamuukw* case:

So, in the end, the legal rights of the Indian people will have to be accommodated within our total society by political compromises and accommodations based in the first instance on negotiation and agreement and ultimately in accordance with the sovereign will of the community as a whole. The legal rights of the Gitksan and Wet'suwet'en peoples, to which this lawsuit is confined, and which allow no room for any approach other than the application of the law itself, and the legal rights of all Aboriginal peoples throughout British Columbia, form only one factor in the ultimate determination of what kind of community we are going to have in British Columbia and throughout Canada in the years ahead. In my view, the failure to recognize the true legal scope of Aboriginal rights at common law, and under the Constitution, will only perpetuate the problems connected with finding the honourable place for the Indian peoples within the British Columbian and Canadian communities to which their legal rights and their ancient cultures entitle them.<sup>51</sup>

### 3. HISTORICAL TREATIES: THE NEED FOR JUSTICE AND RECONCILIATION

Our people have always understood that we must be able to continue to live our lives in accordance with our culture and spirituality. Our elders have taught us that this spirit and intent of our treaty relationship must last as long as the rivers flow and the sun shines. We must wait however long it takes for non-Aboriginal people to understand and respect our way of life. This will be the respect that the treaty relationship between us calls for.

Josephine Sandy  
Ojibwa Tribal Family Services  
Kenora, Ontario, 28 October 1992

By virtue of section 35 of the *Constitution Act, 1982*, existing treaty rights are protected by the constitution. Thus, the treaties are now in a sense part of the

constitution, including the unique relationships they create among nations or peoples. Despite section 35, however, the institutions of government have been slow to reflect the treaties in their laws, policies and practices. All too often, treaty rights are disputed in the courts.

As we have seen, the law of Canada has developed certain rules that pay respect to the unique nature of the treaties. But treaties are also circumscribed by the nature of the law the courts are called upon to apply. The courts have brought to bear a legalistic focus on the written text of treaties. The Commission has concluded that further court decisions may well deepen the gulf between the treaty parties, regardless of who wins and who loses future court battles.

Even when a treaty right prevails in court, there is reluctance to implement that right. Frequently, treaty rights come to courts in connection with criminal prosecutions. There is no readily available mechanism to implement in positive terms a right that has been given judicial recognition as a defence to a charge of unlawful hunting or fishing. Similarly, disputes about reserve land or other important treaty rights are often delayed and frustrated by inappropriate processes for fulfilment, thus perpetuating injustice (see Chapter 4 in Part Two of this volume).

### 3.1 The Need for Justice

The Commission sees the first objective in fulfilling the treaties as the achievement of justice. Treaty rights already identified by the courts should be given force and effect. Our recommendations to achieve justice in this narrow but important sense are set out at the end of this chapter and in other chapters in this volume (see in particular Chapter 4).

Treaty promises were part of the foundation of Canada, and keeping those promises is a challenge to the honour and legitimacy of Canada. The fulfilment of treaty rights already recognized by the courts will bring important benefits to treaty nations people. In particular, the full implementation of hunting, fishing and trapping rights can assist in the revitalization of traditional economies. The fulfilment of treaty land entitlements and the resolution of land claims will provide important resources for creating new economic opportunities.

The implementation of legally recognized rights under the treaties will also demonstrate that the Crown's honour is reflected in the Crown's actions. Until the rights already recognized in Canadian law as being in the treaties are respected, treaty nations cannot be expected to embark on further discussions aimed at deeper reconciliation with other Canadians. It is not enough for governments to say, "Trust us."

The first stage of treaty implementation therefore is to find ways to give effect to treaty rights already acknowledged by the Canadian legal system. Our specific recommendations for short-term implementation are set out later in this chapter and in Chapter 4.

### 3.2 The Need for Reconciliation

By reconciliation we mean more than just giving effect to a treaty hunting right or securing the restoration of reserve land taken unfairly or illegally in the past. We mean embracing the spirit and intent of the treaty relationship itself, a relationship of mutual trust and loyalty, as the framework for a vibrant and respectful new relationship between peoples.

New attitudes must be fostered to bring about this new relationship. A consensus will have to evolve that the treaty relationship continues to be of mutual benefit. New institutions must be created to bring this relationship into being. At present, the relationship between the treaty parties is mired in ignorance, mistrust and prejudice. Indeed, this has been the case for generations.

We embark on this discussion with a full appreciation that Canada is in a fiscal crisis. In our view, however, the cost of the present unreconciled relationship far outweighs the cost of achieving the proper balance in the relationship, particularly when human costs are included. We examined the cost of the present regime and its consequences in terms of poverty, despair and premature death (see Volume 5, Chapter 2). A new relationship built on honouring the treaties will lead to self-reliance, empowerment and the restoration of resources to the treaty nations. It will lead away from the crippling dependence on government that has been engendered in treaty nations communities.

The Commission has identified major issues requiring analysis, reconciliation and redress. They stem from profound differences in the beliefs of the Crown and the treaty nations with respect to the nature and content of the treaties. Before exploring these differences, it is important to lay a foundation for reconciliation by setting out the areas where consensus has been achieved by the treaties.

### 3.3 Common Ground in the Treaties

The courts have sometimes mistakenly regarded the written text as an accurate and complete record of the treaty agreement. There are dangers in going to the other extreme and concluding that the treaties are so completely devoid of consensus that the written records should be discarded. This view would result in a complete rejection of the treaties as representing any kind of agreement whatsoever.

In fact, there is considerable common ground between the Crown and treaty nations concerning the treaties. Both parties perceived the treaties as providing for a shared future. The treaties were to define relationships between governments. They guaranteed a sharing of the economic bounty of the land. They guaranteed peace and prevented war. They involved a mutual respect that was to be enduring. There is common ground in the understanding that once the treaty was made, it would define and shape the future relationship between the parties in a definitive way.

There is common ground in the fact that each party brought to the treaty ceremony its most sacred and enduring symbols. The Crown formalized the treaties using its most formal instrument: a written document under seal. Clergy were often asked to attend treaty councils to provide advice and spiritual guidance to the parties. Representatives of the Crown pledged the word of the sovereign. In the Anglo-Canadian legal tradition, making the treaty agreement under seal gave it force in law, as expressed by Lord Denning of the English Court of Appeal in 1982:

They [the Indian peoples] will be able to say that their rights and freedoms have been guaranteed to them by the Crown, originally by the Crown in respect of the United Kingdom, now by the Crown in respect of Canada, but, in any case, by the Crown. No parliament should do anything to lessen the worth of these guarantees. They should be honoured by the Crown in respect of Canada 'so long as the sun rises and river flows'. That promise must never be broken.<sup>52</sup>

Similarly, the treaty nations drew upon solemn practices from their own laws and traditions: the pipestem, wampum, tobacco and oratory. For the Indian nations of the plains, the sacred pipe sealed the agreements:

The concept of treaty, *inaistisinni*, is not new to the Blood Tribe. Inaistisinni is an ancient principle of law invoked many times by the Bloods to settle conflict, make peace, establish alliances or trade relations with other nations such as the Crow, the Gros Ventre, the Sioux and, more recently, the Americans in 1855 and the British in 1877. Inaistisinni is a key aspect of immemorial law, which served to forge relationships with other nations. Inaistisinni is a sacred covenant, a solemn agreement, that is truly the highest form of agreement, binding for the lifetime of the parties. So solemn is a treaty that it centres around one of our most sacred ceremonies and symbols, the Pipe.

Les Healy  
Lethbridge, Alberta  
25 May 1993

In each case, treaty making was solemnized with the formality appropriate to commitments intended to endure as long as the sun rises and the rivers flow.

### 3.4 Lack of Common Ground

In Volume 1, we showed that the Indian nations and the Crown had divergent views about the fundamental assumptions on which the treaties were based. The Crown's objective was to achieve the extinguishment of Aboriginal title and the subjection of treaty nations to the Crown's authority. The British Crown, like



all European powers that came to the Americas, adhered to the doctrine of discovery. Chief Justice Marshall of the U.S. Supreme Court described this doctrine in a 1823 decision, *Johnson v. M'Intosh*:

This principle was that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession.

The exclusion of all other Europeans necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it. It was a right with which no Europeans could interfere. It was a right which all asserted for themselves, and to the assertion of which, by others, all assented.... While the different nations of Europe respected the right of the natives, as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives. These grants have been understood by all to convey a title to the grantees, subject only to the Indian right of occupancy.<sup>53</sup>

This principle explains the British Crown's purposes in treaty negotiations, at least after the *Royal Proclamation of 1763*. The Crown thought it had dominion over Indian lands, even in the absence of a treaty. Indian title was seen as a possessory right, a cloud upon the Crown's title that could be purchased to perfect that title. Acquisition of that title was a one-time purchase.

The treaty nations regarded the treaties, in terms of their spirit and intent, as a set of solemn, oral and mutual promises to coexist in peace and for mutual benefit. The treaty was to be renewed regularly, to be kept fresh and living. In this view, the piece of paper produced by the Crown was no more the treaty than was the pipestem, the wampum or the tobacco that symbolized the solemnity of the promises.

Each treaty is a unique compact, but there is remarkable consistency in the principles of the treaties as expressed by the treaty nations themselves. They maintain with virtual unanimity that they did not give up either their relationship to the land (or as Europeans called it, their title) or their sovereignty as nations by entering into treaties with the Crown. Indeed, they regard the act of treaty making as an affirmation of those fundamental rights.

Indian treaty nations naturally approached the treaties they made with Europeans on the same basis as the treaties they made with each other. As we saw in Volume 1, indigenous treaty practice was to reinforce the autonomy of nations and to establish relations of kinship among them. To the treaty nations, the making of a treaty affirmed their nationhood and their rights to territory. They created sacred relations of kinship and trust.

### 3.5 The Vulnerability of Treaties

The treaties have been affirmed by both parties, and nullification is not an option for either party.<sup>54</sup> The treaty nations affirm, virtually without exception, that they have valid treaties with the Crown and do not seek to void them. This is key to understanding the position they asserted to this Commission and elsewhere. They take issue not with the existence or essential validity of the treaties but with the Crown's interpretation of the content of the treaties.

In Canadian law, as we have seen, the conduct of the parties after the treaty is relevant to the continuing validity of a treaty.<sup>55</sup> International law, by analogy, provides for limited circumstances under which a party may suspend specific treaty terms when a dispute arises, as opposed to withdrawing from or nullifying the treaty as a whole.<sup>56</sup>

The Commission believes that if the treaty nations were to choose to use all legal means at their disposal to challenge the orthodox legal interpretation of the written text of their treaties, some key provisions of the treaties might well be vulnerable in light of legal doctrines such as duress, *non est factum*, fundamental breach, and breach of the Crown's fiduciary duty.<sup>57</sup> Such proceedings might result in grave legal and financial uncertainty across Canada as long-held rights were called into question.

It is also quite possible that this would not occur. If faced with the argument that the treaties did not, for example, extinguish Aboriginal title, at least some courts might narrow and confine the results of some of the cases of the past 30 years, which have generally been favourable to Aboriginal peoples' interpretation. In this situation, Aboriginal people might become frustrated by the lack of respect for their aspirations, and renewed violence could occur, both within and outside treaty nation communities.

We must emphasize that challenging the legal texts of the historical treaties does not reflect the position of the treaty nations. They have waited steadfastly for implementation of their treaty rights as they understand them. It is the Crown that has marginalized the treaties to the point where questioning their validity – clearly as a last resort – might become an option.

The present tension between the competing visions of what the treaties were intended to accomplish compels the parties to make a choice between two starkly opposed options:

- renegotiating the historical treaties from scratch, or
- identifying and implementing the spirit and intent of these treaties.

### 3.6 Implementing the Spirit and Intent of Treaties

The Commission uses the term 'spirit and intent' to mean the intentions the treaty parties voiced during treaty negotiations as the underlying rationale for entering into a treaty and its expected outcome: sharing, coexistence and mutual

benefit. The term transcends the purely legal nature of treaties and includes their constitutional and spiritual components. It requires the treaties be approached in a liberal and flexible way.

The Commission believes that the spirit and intent of the historical treaties need to be re-discovered and restored as the basis for treaty implementation. We have concluded that the cross-cultural context of treaty making probably resulted in a lack of consent on many vital points in the historical treaties. As the courts have indicated, modern treaties do not give rise to the same difficulties of understanding, but they do pose interpretive problems of their own, as well as, in many cases, stopping short of the comprehensive measures needed to restructure the relationship. We believe that honouring the spirit and intent of the historical treaties requires two distinct approaches:

- a broad and liberal interpretation of the treaty promises and agreements as understood by *both* treaty parties, using all available information regarding the treaty negotiations, including secondary and oral evidence, without giving undue weight to the treaty text; and
- a negotiated compromise on issues on which a thorough examination of the evidence leads to the conclusion that the treaty parties themselves failed to reach consensus.

The key to implementing the spirit and intent of the treaties is the open acknowledgement that the treaty parties may have failed to reach agreement on issues such as Aboriginal title because of the difficulty of translating the central concepts. In this light, it would be unconscionable for the Crown to insist on extinguishment of rights through the treaties because of factors that vitiated the free and informed consent of treaty nations.<sup>58</sup>

It is the Commission's view that Canada should indicate its willingness to assume and implement the obligations of the Crown as these become apparent in light of the spirit and intent of the treaties. This will, of necessity, involve a commitment to decolonize treaty nations.

### 3.7 The Fiduciary Relationship: Restoring the Treaty Partnership

Elsewhere in our report we address the nature of the fiduciary relationship between the Crown and Aboriginal peoples (see Volume 1, chapters 5 and 7; Volume 2, chapters 3 and 4). The nation-to-nation relationship embodied in the practice of treaty making implies a set of *mutual* fiduciary obligations between the nations that were parties to treaties. This relationship arises from the mutual agreement of the treaty parties to share a territory and its benefits and thereby to establish a continuing and irrevocable relationship of coexistence. This can best be understood as a partnership, an idea we had in mind in choosing a title for our special report, *Partners in Confederation*.

Fiduciary principles provide guidance in cases where a relationship has become unbalanced and one party, for one reason or another, becomes vulnerable to the power of the other. Regardless of the partnership relationship that the treaties created or should have created, treaty nations have been deprived of many basic civil and economic rights and as a result have been placed in a state of vulnerability to federal and provincial government power.

The relationship between Aboriginal peoples and the Crown reflects the classic fiduciary paradigm of one party's vulnerability to another's power and discretion. The law imposes clear duties on the 'dominant' party within such a relationship.

In the Commission's view, the Crown is under a fiduciary obligation to implement such measures as are required to reverse this colonial imbalance and help restore its relationship with treaty nations to a true partnership. This will require the Crown to take positive steps toward this end as well as to refrain from taking actions that will frustrate it.

The New Zealand courts have discussed this notion of partnership in connection with the Treaty of Waitangi of 1840. In the 1987 case, *New Zealand Maori Council v. A.-G.*, President Cooke of New Zealand's highest court wrote:

The Treaty [of Waitangi] signified a partnership between races, and it is in this concept that the answer to the present case has to be found....In this context the issue becomes what steps should be taken by the Crown, as a partner acting towards the Maori partner *with the utmost good faith which is the characteristic obligation of partnership*, to ensure that the powers in the State-Owned Enterprises Act are not used inconsistently with the principles of the Treaty.

It should be added...that the duty to act reasonably and in the utmost good faith is not one-sided. For their part the Maori people have undertaken a duty of loyalty to the Queen, full acceptance of her Government through her responsible Ministers, and reasonable co-operation.<sup>59</sup>

Justice Richardson put it this way:

In the domestic constitutional field which is where the Treaty resides under the Treaty of Waitangi Act and the State-Owned Enterprises Act, there is every reason for attributing to both partners that obligation to deal with each other and with their treaty obligations in good faith. That must follow both from the nature of the compact and its continuing application in the life of New Zealand and from its provisions.<sup>60</sup>

Justice Casey wrote that there was a concept of 'ongoing partnership' in the treaty:

Implicit in that relationship is the expectation of good faith by each side in their dealings with the other, and in the way that the Crown exercises the rights of government ceded to it. To say this is to do no



more than assert the maintenance of the "honour of the Crown" underlying all its treaty relationships.<sup>61</sup>

The key principles in such a treaty partnership are those we identified in Volume 1 as the keys to a renewed relationship: mutual recognition, mutual respect, sharing and mutual responsibility.

The treaty partnership must be a goal for the future, since the past has been characterized by a lack of good faith on the part of the Crown, the sometimes arbitrary exercise of power contrary to the interests of Aboriginal peoples, and the imposition of policies of marginalization.

As the relationship between Canada and Aboriginal and treaty nations is gradually restored to one of partnership rather than domination, through the revitalization of existing treaties and the making of new ones, the duty of care may well become more equal and reciprocal in practical terms. As Aboriginal and treaty nations regain their dignity and rights, they will enjoy greater opportunities to interact with Canadian society as a whole and will be honour-bound, by treaty, to act with the same degree of good faith that they quite properly demand of Canada today.

The renewed treaty partnership also disposes of any notion that treaty nations can enjoy rights without corresponding obligations. Indeed, the numbered treaties expressly required treaty nations to keep the peace and enforce the laws. This is one of the bases of a right to establish treaty nation justice systems.<sup>62</sup> Treaties were clearly intended to include mutuality of rights and obligations.

The condition of dependence and underdevelopment among treaty nations is the legacy of disregard for the real nature of the treaty relationship. A fiduciary obligation exists on the part of all Crown institutions to reverse this condition and to foster self-reliance and self-sufficiency among the treaty nations.

### 3.8 Aboriginal Rights and Title: Sharing, Not Extinguishment

As we wrote in *Treaty Making in the Spirit of Co-existence*, nothing is more important to treaty nations than their connection with their traditional lands and territories; nothing is more fundamental to their cultures, their identities and their economies.<sup>63</sup> We were told by many witnesses at our hearings that extinguishment is literally inconceivable in treaty nations cultures. For example, Chief François Paulette testified:

In my language, there is no word for 'surrender'. There is no word for 'surrender'. I cannot describe 'surrender' to you in my language. So how do you expect my people to put their X on 'surrender'?

Chief François Paulette  
Yellowknife, Northwest Territories  
9 December 1992

The treaty nations maintain with virtual unanimity that they did not agree to extinguish their rights to their traditional lands and territories but agreed instead to share them in some equitable fashion with the newcomers. The presentation of Chief George Fern of Fond du Lac First Nation community is representative:

We believe the principle of sharing of our homeland and its natural resources is the basis of the treaty arrangements, not surrender or extinguishment. Accordingly, the concepts of resource co-management and revenue sharing from the Crown lands and resources are the proper forms of treaty implementation. Such arrangements would provide a significant economic basis for self-government, and would provide First Nations with the ability to protect and benefit from Mother Earth.

Chief George Fern  
Prince Albert Tribal Council  
La Ronge, Saskatchewan, 28 May 1992

The written text of many treaties provides for the extinguishment of traditional Aboriginal land rights, in exchange for specified contractual rights, pursuant to the Crown's policy of using the treaty process to extinguish Aboriginal title. The Treaty 7 First Nations recently conducted a treaty review process with respect to their treaty and came to this conclusion:

In 1877, the Blackfoot Confederacy, Tsuu T'ina, and the Stoney entered into an agreement to share the land with the European settlers, resources were never surrendered, the land was never surrendered. These nations were to be taken care of and provided for in perpetuity by the government.

It is now more apparent than ever that there were two understandings at the conclusion of the Treaty at Blackfoot Crossing in 1877. One is the obvious belief by the government that the essence of the Treaty was a land surrender. It must be stressed that according to the Indian Agent Reports, that by the time Treaty 7 was made, treaty making was only a formal exercise to extinguish Indian title to land.

What we believed to be the agreement reached by the Treaty 7 First Nations was an agreement to share the land to the depth of a plow in return for certain concessions.<sup>64</sup>

Insistence by Crown agencies that Aboriginal title was largely extinguished by the treaties has the potential to be highly destructive to the process of reconciliation. The text of the post-1850 treaties clearly provides for the extinguishment of Aboriginal title. But the people of the treaty nations reject that outcome. It is unlikely that any court decision could ever change their minds on this central issue. For this reason, the Commission proposes that the question of lands and resources be addressed on the basis that the continuing relationship

between the parties requires both to accept a reasonable sharing of lands and resources as implicit in the treaty (see Chapter 4). For a range of reasons developed more fully in the next two chapters, we believe that any interpretation of the spirit and intent of the historical treaties that is to endure as the basis of a new relationship must be, and must be seen to be, fair to the First Nations parties in terms of their ownership of, use of and access to their traditional lands and resources.

The implications of a lack of consensus on the issue of title to land are enormous. There is a deep dispute between the treaty parties with respect to the extent of historical treaty agreements, particularly in regard to treaties whose written texts contain extinguishment provisions.

In *Treaty Making in the Spirit of Co-existence*, we wrote of the extinguishment clauses of past treaties:

In light of divergent understandings of extinguishment clauses and the jurisprudence on treaty interpretation...it cannot always be said with certainty that the written terms of an extinguishment clause will determine the clause's legal effect.<sup>65</sup>

We went on to say:

Extinguishment policy during the era of the numbered treaties was designed to clear Aboriginal title for the sake of non-Aboriginal settlement and Aboriginal assimilation. In combination, these purposes do not merely ignore the interests served by Aboriginal title, they negate them. They amount to a justification of extinguishment for extinguishment's sake. These objectives, in our view, do not merit serious consideration in a constitutional regime committed to fundamental principles of equality and respect for Aboriginal difference.<sup>66</sup>

Thus, notwithstanding clear words calling for extinguishment in many historical treaties, it is highly probable that no consent was ever given by Aboriginal parties to that result. Aboriginal people, who believe that the Creator set them on their traditional territories and gave them the responsibility of stewardship of the land and of everything on it, are not likely to have surrendered that land knowingly and willingly to strangers. By the same token it would be entirely consistent with their world view and ethical norms for them to share the land with newcomers.

The legal character of Aboriginal title (see Chapter 4), the source and nature of the Crown's fiduciary duties to Aboriginal peoples (see Volume 1, Chapters 5 and 7 and Chapters 3 and 4 in this volume), and the fundamental contractual nature of the treaties raise a serious question about whether the treaties that purport to extinguish Aboriginal title over large tracts of land actually achieved this end.<sup>67</sup> The treaties did, however, include an agreement to share territory between treaty nations and the newcomers as represented by the Crown.

Thus, it is possible that Aboriginal title continues to coexist with the Crown's rights throughout the areas covered by treaties, despite the Crown's intention to include a cession of Aboriginal title. It is also possible, however, that the courts could continue to give effect to the written text of a treaty, however illegitimate this may be from the treaty nation's perspective.

The treaty relationship requires that the parties meet in a spirit of partnership to complete their incomplete agreement. Since neither party has expressed a wish to nullify the treaties, we must consider how the parties should deal with the issues arising from lack of consensus.

During the negotiations required to complete the treaties, it stands to reason that the Crown should not assert that the Aboriginal title of the treaty nations has been extinguished unless there was clear consent. On the other hand, the treaty nations, having undertaken an obligation of sharing in good faith, must not take any steps that contradict the spirit and intent of a partnership predicated on those principles. Both parties are therefore under constraints, stemming from their treaty obligations, in negotiating the completion of the treaties.

It should be implicit in these negotiations that the principle of sharing, which was central to the treaty nations' purposes in making their treaties, entitles them to an adequate land base to satisfy their contemporary cultural and economic requirements and to support their governments.

### 3.9 Sovereignty and Governance

Sovereignty, like extinguishment, is a concept that does not have a ready analogue in Aboriginal languages and world views (see Chapter 3). Treaty nations uniformly consider that in formalizing treaty relations with the Crown, they were acting as nations. When the treaties accorded mutual recognition and described specific and mutual rights and obligations, the treaty nations were not intending to cede their sovereignty, but to exercise it.

In the 1832 case *Worcester v. State of Georgia*, Chief Justice John Marshall of the United States Supreme Court wrote:

The words "treaty" and "nation" are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense.

...These articles [of treaties between Indian nations and both Great Britain and the United States] are associated with others, recognizing their title to self-government. The very fact of repeated treaties with them recognizes it; and the settled doctrine of the law of nations is that a weaker power does not surrender its independence – its right to self-government, by associating with a stronger and taking its protection.<sup>68</sup>



In his concurring opinion in the same case, Justice McLean asked:

What is a treaty? The answer is, it is a compact formed between two nations or communities, having the right of self-government.

Is it essential that each party shall possess the same attributes of sovereignty to give force to the treaty? This will not be pretended; for, on this ground, very few valid treaties could be formed. The only requisite is, that each of the contracting parties shall possess the right of self-government, and the power to perform the stipulations of the treaty.<sup>69</sup>

We do not quote these words in support of any theory that the Crown and the treaty nations had or have the same or different attributes of sovereignty but to confirm the essential link between the right and power of a people to govern themselves and the act of treaty making.

The Commission believes that the spirit and intent of the treaties requires the Crown to respect the inherent right of the treaty nations to govern their own affairs and territories. Implicit in this principle, of course, is the right of treaty nations to enter into intergovernmental relations with the Crown, to acquire the benefits of such agreements, and to incur their burdens voluntarily.

In this connection, there will have to be an examination of how these rights are to be exercised. The Aboriginal people who can assert and exercise such a right are members of the nations that entered into treaties with the Crown. In entering into nation-to-nation treaties with them, the Crown has already acknowledged their self-governing nation status. Other Aboriginal nations have not yet entered into treaties with the Crown. As we discuss in Chapter 3, they have a right to negotiate and enter into treaties that will set out their powers of governance.

### 3.10 Observations Regarding Fulfilment of the Historical Treaties

The historical treaties (including the written and oral versions) cover a wide range of topics. The Commission does not intend to catalogue the particular rights and obligations in these treaties, but we want to caution against ignoring the unwritten assumptions about the treaties that have contributed to so much misunderstanding.

We make the following observations regarding the historical treaties:

- Specific rights of the treaty nations under the treaties have not been recognized or implemented in many, and possibly most, cases.
- The implicit treaty right of governance has not been recognized.
- In many, if not most cases, implementation of treaties has resulted in an imbalance in the benefits and the burdens of the treaty relationship in favour of the Crown and against the interests of the treaty nations.

- Canadian law has tended to give force to the treaty texts that purport to extinguish the rights and title of treaty nations, while not giving effect to aspects of the treaties that require the Crown to fulfil its fiduciary duties to implement the treaties fully and fairly.

If the validity of the historical treaties – or certain key components of them, including the extinguishment clauses – were placed before the courts, key aspects of many portions of the written texts might be set aside on the following bases:

- In some cases, treaty nations may not have given informed consent to the extinguishment of their rights and title.<sup>70</sup>
- In some cases, important components of the treaties may not have been included in the written text drafted by the Crown.<sup>71</sup>
- In some cases the letter of the treaty text may have been fulfilled, but the spirit and intent, which require a broader interpretation of the text, may have been breached.<sup>72</sup>
- In some cases, the failure of the Crown to provide some treaty entitlements may constitute fundamental breach.<sup>73</sup>
- In some cases, treaties might be found unconscionable, or agreement might be found to have been induced by fraud, undue influence or duress.<sup>74</sup>
- In some cases, implementation of the treaties might be found to fall short of the standards required of a fiduciary.

Finally, the written texts of the historical treaties do not set out treaty nations' inherent right of self-government in explicit terms. This has led to doubt on the part of non-Aboriginal governments and courts about whether governance is a treaty right.

These observations lead us to conclude that, if no alternative to the courts can be found, historical treaties in many, if not most, parts of Canada may well be the subject of renewed court challenges.

A better process must be found.

## RECOMMENDATION

The Commission recommends that

### Fulfilment of 2.2.2 Historical Treaties

The parties implement the historical treaties from the perspective of both justice and reconciliation:

- (a) Justice requires the fulfilment of the agreed terms of the treaties, as recorded in the treaty text and supplemented by oral evidence.

- (b) Reconciliation requires the establishment of proper principles to govern the continuing treaty relationship and to complete treaties that are incomplete because of the absence of consensus.

#### 4. TREATY IMPLEMENTATION AND RENEWAL PROCESSES

The approach we prefer at the present time is to proceed on the basis of the treaty relationship. We hope that with the new government we can enter into some kind of a national process, a bilateral process, so that we can begin to look at how we are in fact going to implement not only the treaties but the inherent right to self-government as well.

National Chief Ovide Mercredi  
Assembly of First Nations  
Ottawa, Ontario, 5 November 1993

The sources of the under-development, poverty, disease and dependence within our First Nations can be found in the disregard and violation of our treaties and of Canada's own constitution. Likewise, the seeds of the solutions to the fundamental problems and contradictions can be found in the honouring and faithful implementation of these sacred treaty rights and obligations.

Vice-Chief John McDonald  
Prince Albert Tribal Council and Denesuliné First Nations  
La Ronge, Saskatchewan, 28 May 1992

If the Royal Commission is truly interested in furthering resolution of the injustices committed against our nations in the name of the Crown, then you must join us in calling upon the Crown in right of Canada to return to the relationship between our peoples as intended by the treaty and enter into a comprehensive bilateral process of treaty review with each First Nation on a nation-to-nation basis. Only this type of bilateral nation-to-nation dialogue will be capable of resolving our differences and restoring the honour of the Crown.

Chief Johnson Sewepagham  
Little Red River Cree Nation/The Tall Cree First Nation  
High Level, Alberta, 29 October 1992

During our hearings, leaders and members of treaty nations without exception called for the establishment of a treaty implementation and renewal process. The

Commission agrees. This is not the creation of a new process but the renewal of a very old one.

In the opinion of Commissioners, a treaty implementation and renewal process is the appropriate way to address issues of relevance to the treaty relationship. If the process is renewed in a fashion that properly respects the treaties and the beliefs and diversity of the treaty nations, it will usher in a new era in the life of Aboriginal peoples and Canadians.

This section focuses on the historical treaties. These agreements were made before the general availability of legal representation to Aboriginal people. The modern treaties are lengthy, detailed and the product of extensive negotiation. They may not, however, address all the dimensions of an agreement that meets the standards of fairness and completeness we are seeking to establish through this report. We address the special challenges of the modern treaties later in this chapter.

Presenters testified variously to the need for a “bilateral treaty process”, a “treaty implementation process”, “treaty renovation”, “treaty review” or simply a “treaty process.” Their terminology varied, but all agreed that the existing treaties need to be revisited and revitalized.

Many emphasized the bilateral nature of the proposed treaty process.<sup>75</sup> We refer to ‘treaty implementation and renewal processes’ without always prefacing the term with ‘bilateral’. The treaties are correctly perceived by treaty nations as being bilateral in nature: the treaty nations are one party, and the Crown is the other.<sup>76</sup> Treaty nations, in many cases, regard their relationship under treaty as one made between sovereigns. Certainly, they all regard their relationship as being between nations or peoples. Each of the treaties represents the coming together of two separate cultures, political systems, legal systems and systems of land tenure. The treaties are therefore, in this sense, fundamentally bilateral.

Each side of the treaty implementation relationship, however, can be politically complex. Treaty nations, for example, can be made up of different clans, tribes or villages, recognized by their own laws and customs. In addition, in some places, traditional treaty nation political structures have been superseded by the establishment of band councils elected under the *Indian Act*, as well as by other entities, such as tribal councils and provincial, regional and national political associations, to represent some treaty nations for some purposes.

Similarly, while ‘the Crown’ is in a very real sense a single party to a bilateral treaty relationship, Her Majesty the Queen is advised by many ministers of many governments and has no real authority independent of them. In Canada, Parliament has the primary legislative authority and the federal government executive responsibility for fulfilling the treaties, but many treaty issues involve matters within provincial jurisdiction and ownership, particularly lands and natural resources.

The Crown in Canada today is a concept that both constrains governments from wrongful actions and acts more positively as an affirmative and hon-



ourable force that is required to uphold treaty relationships and treaty promises made on behalf of society as a whole.

Some treaty nations continue to regard the Crown in right of the United Kingdom as having continuing relevance to their treaty relationships. Their views on this matter are strongly held and worthy of respect.

While the treaty relationship is bilateral in nature, issues of representation of the two treaty parties will be important to the success of a bilateral treaty process. Many treaty implementation discussions may involve more than one government on both sides. On one side will be the federal and provincial governments. In time, treaty nations will have governments that are in effect 'federal', with individual band governments or their successors retaining certain local autonomy within a broader treaty nation government structure. The result of a successful treaty process will determine how the governments of treaty nations will function as one of three orders of government within the Canadian federation. The essential bilateral nature of the relationship will be preserved, but the discussions may involve more than a single government entity on each side of the table.

We refer to a process of implementation and renewal of the historical treaties. The treaty nations do not want to start afresh and create a new relationship between the parties. They want the treaties to be implemented in the context of the traditional relationship but in a way that the parties can agree effects a just and reasonable resolution of areas in dispute. They see the treaties as sacred compacts between peoples, not as relics of the past, and they want them renewed in that spirit. We use the term 'implementation' because treaties already deal at least implicitly with the issues raised by treaty nations. We use the term renewal to emphasize the need to revitalize, in contemporary form, the treaty relationships established so long ago.

The treaty process will involve the negotiation of gaps in the record of the original treaty as recorded by the Crown. As we have concluded, the treaty nations see the written text of the historical treaties as incomplete and misleading. Negotiation of these gaps does not imply renegotiation of the entire treaty. The proposed treaty process is *not* a renegotiation of the existing historical treaties. The treaty nations did not ask the Commission to recommend renegotiation of their treaties, or nullification, amendment or reopening of them. In light of the history of many of the treaties, particularly the consistent implementation of only one view of the treaty relationship, at the expense of the other, this is perhaps surprising.

According to the approach of Canadian law to date, many of the treaties resulted in the extinguishment of the most fundamental rights any people can possess. Against this backdrop, it is remarkable that a repudiation of the treaties has not been asserted with greater vigour. On the contrary, the treaty nations that testified before the Commission asserted that all the terms of the treaties – including matters that were not recorded by the Crown – continue to exist and

require only identification and implementation. They do not regard the written texts of treaties as authoritative; but neither do they repudiate or seek to nullify their treaties. The point the treaty nations make, however, is that the original treaty, however ambiguous, one-sided or deficient, created a relationship between the parties that continues today; what is required is a process undertaken in the context of that relationship and consistent with the spirit that generated it.

The consistent message emerging from the testimony of treaty nations is that the treaties are sacred and spiritual covenants that cannot be repudiated, any more than the cultures and identities of treaty nations can be repudiated. In entering into treaties, treaty nations maintain that they made an irreversible and spiritual alliance with the Crown that cannot be broken.

The treaty nations believe that their fundamental relationship with the Crown has been made and solemnified: what is required is a continuing process occurring in the context of that relationship.

The federal government has regarded outstanding treaty issues as claims or grievances, so it has established a claims procedure that seeks finality and certainty in one-time settlements, arrived at through negotiation. While the treaty process will involve negotiations to give effect to the spirit and intent of treaties, it will be shaped by the pre-existing relationship of partnership.

With remarkable uniformity, the treaty nations consider that their treaties with the Crown already contain commitments to maintain that partnership and to review it periodically. Many early treaties contain explicit commitments to renew and continue to renew the treaty relationship. The distribution of annuities on annual treaty days under many treaties is regarded as much more than the payment of rent. It is regarded as a formal opportunity to discuss and renew the relationship each year.

We quote the words of Lord Sankey, of the Judicial Committee of the Privy Council, who described the *British North America Act* as “a living tree capable of growth and expansion within its natural limits.”<sup>77</sup> Just as a country’s constitution is organic, being shaped and reshaped continually by the evolving circumstances of human society, the principles of treaties made between nations must also be interpreted as the relationship evolves. In this light, the treaties must also be flexible enough to include new matters that might not have been raised at the time of the original treaty discussion. Treaty relationships, once established or re-established, must be flexible enough to address new items of concern.

The treaty process will thus emphasize the treaty as a set of mutual rights and mutual fiduciary obligations appropriate to the continuing relationship between treaty partners, rather than as a set of claims and grievances. In this process, there will be a mutual endeavour to achieve clarity, precision and certainty with respect to the content of treaty rights and obligations on both sides.

Canada is fortunate to have a living tradition of treaty making that can now be revitalized. In some countries, notably Australia, no treaty process with

Indigenous peoples was ever commenced, and the struggle to begin reconciliation between Indigenous and non-Indigenous peoples is now under way after 200 years of denial of Aboriginal rights.<sup>78</sup>

In other countries, such as the United States, the government terminated the treaty process unilaterally in the last century,<sup>79</sup> creating severe anomalies among the Native American peoples and withdrawing from them the principal and constitutionally recognized means of establishing and maintaining their relationship with the United States.<sup>80</sup> It is significant that in New Zealand, where a form of treaty process exists, important advances in Maori rights have been achieved.

In Canada, the constitutional recognition of rights under land claims agreements as treaty rights is symbolic of the continued vitality of the treaty process, regardless of the difficulties inherent in contemporary claims policies. As a result, Canada could set a precedent among the nations of the world in using or reviving the treaty as the primary means of legitimizing relations with indigenous nations.

Making a treaty does not require the parties to put aside all their political and legal differences, much less adopt each other's world view. A treaty is a mutual recognition of a common set of interests by nations that regard themselves as separate in some fundamental way. Treaty relationships will evolve organically, but there must be no expectation that one world view will disappear in the process. On the contrary, treaty making legitimizes and celebrates the distinctiveness of the parties while establishing their bonds of honour and trust.

In Canada, the establishment of formal processes to address treaty issues has been suggested in the past. Perhaps most notably, in 1985 and 1986 discussions took place between some of the First Nations that are party to Treaty 8 and David Crombie, then minister of Indian affairs, with the objective of renovating that treaty. Crombie described the proposed initiative in a letter to Treaty 8 head negotiator Harold Cardinal on 11 March 1985. His words eloquently express our own view of the treaty implementation process:

As you know, I have appointed Mr. Frank Oberle, M.P. to explore ways in which problems or grievances in regard to the current treaty can be remedied, unfulfilled portions of the treaty can be fulfilled, and the spirit and intent of the treaty can be utilized as the basis for an agreement upon which we can move into the future. Where my current mandate is not sufficient to accommodate the needs of this process, I am willing to proceed to Cabinet with a request that Cabinet issue appropriate authority. I agree that where appropriate, the federal government could introduce legislation to implement or reaffirm the agreement. I reiterate your own statement that such discussions and agreement would not be a repudiation nor a renegotiation of the treaty but would be an affirmation and clarification of its true terms. In addition to matters dealt with under the treaty, additional agreements might be contemplated by both parties.



While I am willing to consider the articles of the treaty, the report of the treaty commissioners and other written contemporary report, and the Indian understanding of the treaty including written and oral history, I do not believe that we need to be limited in this fashion and that it is much more important that we recognize that the treaty is the expression of a special relationship, which itself needs to be renewed and restored. It is in the spirit and intent of this, rather than a legalistic requirement that you produce evidence, that we should proceed....The exercise, in my view, offers an opportunity to redesign and reconceptualize your relationship with the federal government in a way which reinforces your historical and constitutional rights as Indian First Nations, while at the same time, restoring to you the means to manage your own affairs.

The process was endorsed by Prime Minister Mulroney during the first ministers conference of April 1985.<sup>81</sup>

The ministerial appointee, Frank Oberle, prepared a discussion paper on the scope and issues of the renovation initiative, which was sent to Mr. Crombie on 31 January 1986 and set out a detailed program for a step-by-step renovation of the issues arising from Treaty 8.<sup>82</sup> But the proposed process faltered because of a lack of formal cabinet authorization.<sup>83</sup> This experiment illustrates the need for formal government commitment. The presentations of Treaty 8 leaders showed that they continue to strive for a treaty review process, despite the setbacks of the past.<sup>84</sup>

Proposals for a treaty process led to the inclusion of several provisions in the 1992 Charlottetown Accord:

- (2) The government of Canada is committed to establishing treaty processes to clarify or implement treaty rights and, where the parties agree, to rectify the terms of the treaties, and is committed, where requested by the Aboriginal peoples of Canada concerned, to participating in good faith in the process that relates to them.
- (3) The governments of the provinces and territories are committed, to the extent that they have jurisdiction, to participating in good faith in the processes referred to in subsection (2), where jointly invited by the government of Canada and the Aboriginal peoples of Canada concerned or where it is specified that they will do so under the terms of the treaty concerned.
- (4) The participants in the processes referred to in subsection (2) shall have regard to, among other things and where appropriate, the spirit and intent of the treaties, as understood by the Aboriginal peoples concerned.



- (5) For greater certainty, all those Aboriginal peoples of Canada who have treaty rights shall have equitable access to the processes referred to in this section.
- (6) Nothing in this section abrogates or derogates from any rights of the Aboriginal peoples of Canada who are not parties to a particular treaty.<sup>85</sup>

These provisions died with the accord, but they demonstrate that, quite recently, this idea had broad acceptability among federal, provincial and territorial governments, as well as the leadership of the national Aboriginal organizations.

In 1993, the electoral platform of the Liberal Party of Canada, which now forms the government, expressed support for the idea of a treaty process.<sup>86</sup> Since taking office, the government has indeed begun to address the need for treaty processes. The Manitoba Framework Agreement, dated 7 December 1994, between the minister of Indian affairs and 60 First Nations communities in Manitoba, provides as one of its principles:

- 5.3 In this process, the Treaty rights of First Nations will be given an interpretation, to be agreed upon by Canada and First Nations, in contemporary terms while giving full recognition to their original spirit and intent.<sup>87</sup>

The Mohawk/Canada Roundtable is another process whereby the government of Canada and the Mohawk communities of Akwesasne, Kahnawake and Kanesatake have begun discussions "to promote harmony and peaceful coexistence among the Mohawks and Canada through cooperation and non-confrontational negotiations."<sup>88</sup> These Mohawk communities have tabled a joint statement on the inherent right of self-determination that asks Parliament to pass legislation to "empower the process of negotiating treaties and other arrangement[s] between Mohawk governments and Canada."<sup>89</sup>

In addition, Ron Irwin, minister of Indian affairs, and the Confederacy of Treaty 6 First Nations signed a declaration of intent on 16 March 1995 containing an agreement to "develop a protocol for bilateral Treaty discussions respecting Treaty Six".<sup>90</sup>

On 10 August 1995, the government of Canada announced new policy proposals for the negotiation of self-government in which it envisaged self-government agreements being constitutionally protected as treaty rights.

The government of Canada is prepared, where the other parties agree, constitutionally to protect rights set out in negotiated self-government agreements as treaty rights within the meaning of section 35 of the *Constitution Act, 1982*. Implementation of the inherent right in this fashion would be a continuation of the historical relationship between Aboriginal peoples and the Crown. Self-government rights could be protected under section 35

- in new treaties;
- as part of comprehensive land claims agreements; or
- as additions to existing treaties.

Treaties create mutually binding obligations and commitments that are constitutionally protected. Recognizing the solemn and enduring nature of treaty rights, the government believes that the primary criterion for determining whether a matter should receive constitutional protection is whether it is a fundamental element of self-government that should bind future generations. Under this approach, suitable matters for constitutional protection would include

- a listing of jurisdictions or authorities by subject matter and related arrangements;
- the relationship of Aboriginal laws to federal and provincial laws;
- the geographic area within which the Aboriginal government or institution will exercise its jurisdiction or authority, and the people to be affected by it; and
- matters relating to the accountability of the Aboriginal government to its members, in order to establish its legitimacy and the legitimacy of its laws within the constitution of Canada.<sup>91</sup>

These initiatives, particularly the last one, are generally consistent with the Commission's recommendations for new treaty implementation and renewal and treaty-making processes. However, as we explain later in this chapter and in the next chapter, the Commission is of the view that these treaty processes should be centred around Aboriginal nations and treaty nations rather than individual communities.

Our observations about the nature of the treaties and the relationships established by them apply to the modern as well as the historical treaties. The circumstances under which the modern treaties were negotiated dictate a different focus for implementation and renewal, but in principle the goal of renewing and revitalizing the relationship is the same.

## RECOMMENDATIONS

The Commission recommends that

- |  |  |
|--|--|
| Treaty<br>Implementation<br>and Renewal<br>Process | <p><b>2.2.3</b></p> <p>The federal government establish a continuing bilateral process to implement and renew the Crown's relationship with and obligations to the treaty nations under the historical treaties, in accordance with the treaties' spirit and intent.</p> |
|--|--|

Principles of 2.2.4  
Implementation

The spirit and intent of the historical treaties be implemented in accordance with the following fundamental principles:

- (a) The specific content of the rights and obligations of the parties to the treaties is determined for all purposes in a just and liberal way, by reference to oral as well as written sources.
- (b) The Crown is in a trust-like and non-adversarial fiduciary relationship with the treaty nations.
- (c) The Crown's conflicting duties to the treaty nations and to Canadians generally is reconciled in the spirit of the treaty partnership.
- (d) There is a presumption in respect of the historical treaties that
  - treaty nations did not intend to consent to the blanket extinguishment of their Aboriginal rights and title by entering into the treaty relationship;
  - treaty nations intended to share the territory and jurisdiction and management over it, as opposed to ceding the territory, even where the text of an historical treaty makes reference to a blanket extinguishment of land rights; and
  - treaty nations did not intend to give up their inherent right of governance by entering into a treaty relationship, and the act of treaty making is regarded as an affirmation rather than a denial of that right.

Reconciliation of 2.2.5  
Laws and Policies

Once the spirit and intent of specific treaties have been recognized and incorporated into the agreed understanding of the treaty, all laws, policies and practices that have a bearing on the terms of the treaty be made to reflect this understanding.

## 5. TREATY-MAKING PROCESSES

It is self-defeating to pursue a policy that supposes that the terms of a land claims agreement can be fixed for all time. There can be no acceptable final definition of the compromises that must be made between societies over succeeding generations. The conclusion of a modern land claims agreement must be seen as a beginning, not as an end.

The emphasis on finality in the current federal land claims policy is at odds with the federal government's expressed support for

Aboriginal self-government. In the event that comprehensive land claims agreements are to serve as a central reference point in the balancing of the distinctiveness of Aboriginal societies and the demands of a common Canadian citizenship, then the agreements must be open to periodic review, renegotiation and amendment. It is ambitious enough for the representatives of the Crown and an Aboriginal people to achieve a mutually beneficial agreement for the foreseeable future; it is ludicrous to try to anticipate with precision the circumstances and needs of all future generations.

Bernadette Makpah

Nunavut Tunngavik Inc.

Montreal, Quebec, 29 November 1993

Much of what we have written about implementing and renewing existing treaties can be applied, with modifications, to making new treaties. At present, the comprehensive claims policy is the only vehicle for negotiations between Aboriginal nations and the Crown on questions of fundamental rights and relationships. As discussed in our report, *Treaty Making in the Spirit of Co-existence: An Alternative to Extinguishment*, the comprehensive claims policy continues to contemplate blanket extinguishment as a possible option in settlement agreements. We discussed alternatives to this approach in that report and direct the reader to it. Later in this volume, we address in greater detail the shortcomings of the comprehensive claims policy as a basis for making treaties (see Chapter 4 in Part Two of this volume).

Under section 35(3) of the *Constitution Act, 1982*, rights under land claims agreements, including comprehensive claims agreements, are deemed to be existing treaty rights for constitutional purposes. In our view, however, this does not make the process of achieving these agreements a complete treaty process; because of the limitations of the existing process, it does not necessarily result in a satisfactory treaty relationship either. Present federal policy does not permit the negotiation of governance rights as an integral component of a comprehensive claims agreement. Delegated self-government arrangements can be negotiated and are being negotiated in tandem with comprehensive claims, but federal policy denies the possibility of those arrangements acquiring the status of treaty rights under section 35 of the *Constitution Act, 1982*.<sup>92</sup>

The comprehensive claims process aims to achieve an exchange of Aboriginal rights to land for rights derived exclusively from a claims agreement. In this process, all residual Aboriginal rights to land, other than lands in "specified or reserved areas", are to be extinguished.<sup>93</sup> In our view, the making of new treaties should occur on the basis of mutual recognition as a means to just and fair coexistence of Aboriginal and non-Aboriginal people. Blanket extinguishment of Aboriginal rights and title does not foster this result. Similarly, as discussed in the next chapter, we regard every Aboriginal and treaty nation as



having an inherent right of self-government, which includes the right to enter into a treaty with the Crown that explicitly addresses self-government.

The present comprehensive claims policy has three main deficiencies:

- First, it does not acknowledge the inherent right of self-government as giving rise to treaty rights of governance under section 35 of the Constitution Act, 1982.
- Second, it continues to contemplate blanket extinguishment of Aboriginal rights and title as an option.
- Third, it excludes Métis people and certain First Nations claimant groups.

## 5.1 Implementation of Modern Treaties

Our essential conclusions about the historical treaties are equally applicable to treaties that will be made in the future. We regard the treaty-making process as a continuing and vital part of Canadian life. We do not regard modern treaties as any less binding or enduring than earlier ones. We agree that treaties made in the future, like those made in the recent past, will be made largely on the basis of a common language and greater sensitivity on both sides to the matters that can produce difficulties of interpretation. Having said this, modern treaties and future treaties alike will benefit from the perspective that they are, above all, embodiments of a nation-to-nation partnership.

Our assessment of the comprehensive claims policy leads us to conclude that implementation of modern treaties made under that policy should involve two main themes. First, they should be reopened to permit the addition of constitutionally entrenched rights of self-government. The full implications of this conclusion will be fleshed out in the next chapter. Second, where a modern treaty contains a provision for the blanket extinguishment of the Aboriginal party's land rights, that party might elect to have the treaty reopened for renegotiation.

Renegotiation would require *both* parties to begin again at the starting point of those treaties. Logically, this would require the revival of Aboriginal rights to land that were extinguished in blanket fashion. However, it would also require the Aboriginal party to account for all benefits received in exchange for extinguishment. It is quite possible that the federal, provincial or territorial governments involved in the renegotiation would be unwilling to pay as much as was provided in the original agreements, given their view that renegotiation could diminish the degree of certainty and finality involved.

We must also emphasize that renegotiating modern treaties would require untangling the complex arrangements that have grown up around them. Unlike historical treaties, modern treaties call explicitly for frequent renegotiation of particular issues and contain dispute-resolution mechanisms negotiated by the parties and tailor-made for the circumstances of the original agreement. In this sense, they are 'living' agreements to a greater extent than the historical treaties. We

would therefore urge the parties to modern treaties to exercise caution in discussing implementation and renewal of these treaties. Nevertheless, to the extent that these treaties do not meet the requirements of a modern relationship as outlined in this chapter, they warrant modification.

It may well be that the treaty principles we have identified can be implemented without wholesale renegotiation. It may also be possible for the negotiations we envisage to take place within the framework of the modern treaties. We encourage the parties to explore all their options and the implications of their treaty partnership before concluding that wholesale renegotiation must occur.

## 5.2 The Peace and Friendship Treaties

At the other historical extreme from the modern treaties are the historical treaties known as the peace and friendship treaties. Many treaties were made with Indian nations before 1763, when the Crown began to use the treaty process to acquire territory and extinguish Aboriginal title. The rights in these peace and friendship treaties continue to have force and constitutional protection.<sup>94</sup> They do not, however, purport to codify the entire relationship between the parties. In particular, they do not address title to the ancestral lands of the treaty nations. It is clear that these treaties were the beginning of a process that remains unfinished.

The *Mi'kmaq Treaty Handbook*, published in 1987 by the Grand Council of Micmacs, the Union of Nova Scotia Indians and the Native Council of Nova Scotia, states:

The surviving documents are often incomplete summaries of meetings that typically required many days and were repeated every few years as necessary. By themselves, the documents are fragments; considered together, they constitute a great chain of agreement. In other words, the treaty documents...should be seen not as distinct treaties but as stages and renewals of a larger agreement or pact that developed during the 1700s between the Mi'kmaq and the British.

By entering into treaty, Britain joined our circle of brother nations, the Wabanaki Confederacy, and we joined its circle of nations known as the British Commonwealth....

We have fulfilled our only agreement to date: to remain friends and allies of the British Crown and to live in peace with all of his or her subjects....

Now, if our conditions are to be improved and our differences reconciled it must be by an arrangement that takes the past into account. What is required is policy and action that acknowledge the treaty relationship we developed with the British Crown.<sup>95</sup>

Whether the land issue is the proper subject for a new treaty or the continuation of an existing treaty or series of treaties is a matter for the treaty par-

ties to decide. The same is true for the negotiation of treaties that address the jurisdiction of treaty nation governments for the first time.

For many years, the nations that are parties to early peace and friendship treaties were denied access to the comprehensive claims process because it was assumed that their land rights had been superseded by law (see Chapter 4). The Commission does not regard this conclusion, whether legally sound or not, as a legitimate reason to deny access to the treaty-making process. Denial of access to the treaty-making process cannot be justified by any non-consensual appropriation of Aboriginal rights to land.

### 5.3 Making New Treaties and Equivalent Agreements

The Commission does caution that not all groups of Aboriginal people will be eligible for treaty nation standing. The basic unit of Aboriginal self-determination and self-governance is the nation (see Chapter 3), and in our view only nations can have treaty relations with the Crown. There must be some objective criteria that define a nation, and we discuss what these might be in the next chapter.

First Nations, Inuit and Métis presenters at our hearings pointed out that their peoples are distinct from each other, with different political and cultural traditions, including their traditions of forming relationships with the Crown and with other peoples. Treaty making has been the traditional method whereby First Nations and the Crown have made compacts for coexistence. To avoid misunderstanding, we emphasize that we are not advocating the adoption of First Nations traditions by Inuit and Métis groups.

Our focus is the formalization of new relationships. Internationally, the treaty is used to achieve this between nation-states. In Canada, although treaties have been used to fashion *sui generis* relationships with Aboriginal peoples, the term has been used primarily in connection with First Nations. The agreements made in the future between the Crown and Aboriginal nations might well be called accords, compacts, land claims agreements, settlement agreements or other appropriate terms. They would reflect different world views and priorities. Indeed, if they are true treaties, they would necessarily give expression to the unique rights and cultures of the Aboriginal nations signing them. Our point is that treaty relationships and access to treaty institutions should be extended to all nations of Aboriginal people that want to have them.

We must also caution that we regard treaty making as the exclusive preserve of nations. In the case of the treaty implementation and renewal process described earlier in this chapter, the nation status of the treaty nations was determined by the original act of treaty making. In the case of Aboriginal nations seeking to enter the treaty process today, their status as nations will have to be established.

To open the treaty-making process to Aboriginal groups that do not meet the criteria of a nation would detract from the fundamental nature of treaties and



the integrity and status of the nations that make them. This does not preclude a variety of other initiatives to give effect to the rights and aspirations of groups that do not qualify as nations. It simply preserves the essential nation-to-nation nature of the treaties.

### **Inuit land claims agreements**

The Inuit experience with treaties has been restricted to the modern comprehensive land claims process,<sup>96</sup> beginning in 1975 with the James Bay and Northern Quebec Agreement and continuing with the Inuvialuit Final Agreement in 1984 and the signing of the Nunavut Land Claims Agreement on 25 May 1993.<sup>97</sup> These agreements are often termed modern treaties. Negotiations on the Labrador Inuit claims continue. The Inuit leadership, like that of First Nations that have signed comprehensive claims agreements, has questioned the legitimacy of the extinguishment clauses in those agreements.<sup>98</sup>

The Inuit leadership has sought constitutional recognition of Inuit Aboriginal rights, including the right of self-government, and has generally striven for forms of public government. Inuit refer to themselves as a people rather than as a nation or nations. This terminology does not alter the fact that many Inuit groups would likely meet the criteria of nationhood and would be eligible to establish a treaty process if they wanted to do so.

Again, we emphasize that there is no reason why treaties with Inuit have to resemble those with other Aboriginal peoples. As Inuit land claims agreements show, the negotiation of a modern treaty can result in public government and include many other elements tailored to the circumstances of Inuit.

### **Métis treaties**

Some persons regarded as Métis were included as 'Indians' in some of the historical treaties, but Métis people generally have been excluded from treaty making. More recently the Métis Association of the Northwest Territories signed the 1990 final agreement on the Dene/Métis claim in the Northwest Territories. That agreement has not been ratified, however, because of objections to its reference to blanket extinguishment of Aboriginal rights to land. The Sahtu Métis (along with the Sahtu Dene) have since signed a comprehensive claims agreement.<sup>99</sup>

The Commission regards Métis people as eligible to negotiate a treaty relationship with Canada subject to the criteria defining 'nation' or 'people'.

The western Métis Nation has pursued negotiations for a Métis Nation accord, but the latest attempt was thwarted by the failure of the Charlottetown Accord in 1992. In our view, such an accord, being based on nation-to-nation dealings, would be a treaty. The Métis Nation must have full access to all processes and institutions to assist in the negotiation of a satisfactory treaty or accord. The unique situation of Métis people may of course give rise to agreements that have little resemblance to treaties made by First Nations.



## RECOMMENDATION

The Commission recommends that

### Making New 2.2.6

Treaties and  
Agreements

The federal government establish a process for making new treaties to replace the existing comprehensive claims policy, based on the following principles:

- (a) The blanket extinguishment of Aboriginal land rights is not an option.
- (b) Recognition of rights of governance is an integral component of new treaty relationships.
- (c) The treaty-making process is available to all Aboriginal nations, including Indian, Inuit and Métis nations.
- (d) Treaty nations that are parties to peace and friendship treaties that did not purport to address land and resource issues have access to the treaty-making process to complete their treaty relationships with the Crown.

## 6. ESTABLISHMENT OF TREATY PROCESSES

Regarding those parts of Canada which have not yet been covered by land claims settlements, we believe the government should now, belatedly, endorse the principle underlying the *Royal Proclamation of 1763*. Following the consolidation of British North America, this proclamation enunciated the principle of leaving Aboriginal people in possession of all the lands outside the settled colonies of the time and forbidding European settlement of these Aboriginal-held lands until agreements had been reached between the Aboriginal peoples of each region and the Crown. While the terms of the Royal Proclamation were never carried out, this policy still makes admirable sense.

Modern Aboriginal policy, particularly with regard to those groups in the undeveloped or partially developed frontier regions not yet ceded to Canada by Aboriginal people, including much of the interior and some of the coast of Newfoundland and Labrador, needs a 1990s version of the Royal Proclamation, that is, a renewed commitment by Canada to bring about, with utmost urgency, freely-negotiated agreements which will create a new set of partnerships

within Confederation with Aboriginal nations and, to a large extent, retroactively legitimate the process of development and non-Aboriginal settlement.

Dr. Adrian Tanner  
Native Peoples' Support Group  
of Newfoundland and Labrador  
St. John's, Newfoundland, 22 May 1992

The Commission believes that treaty processes should be established pursuant to a formal declaration of the Crown and have an explicit statutory foundation. We also propose the creation of new institutions to facilitate these processes.

## 6.1 A Royal Proclamation

A treaty is an exercise of the prerogative powers of the Crown. A declaration of the Crown's commitment to the treaties is, in our view, properly made by a royal proclamation.

The *Royal Proclamation of 1763* was the most significant landmark in the Crown's history of treaty making with Aboriginal peoples. While not a treaty, the Proclamation did establish fundamental principles to guide the Crown in making treaties, particularly with regard to the lands of Indian nations.

The Proclamation also stands as an important recognition of the rights of Aboriginal peoples and their status as nations. It has been called the Indian Bill of Rights, and it continues to have the force of law in Canada. It is at least quasi-constitutional in nature, if not a fundamental component of the constitutional law of Canada.<sup>100</sup>

In keeping with its high symbolic importance, and to lend substantive legitimacy to the new approach to treaty relations that we recommend, it would be appropriate for the Crown, in the person of the reigning monarch, to announce the establishment of a new era of respect for the treaties. We therefore conclude that formal renewal of treaty processes should be initiated by a royal proclamation to supplement the *Royal Proclamation of 1763*.

The new proclamation should have the same standing in Canadian law and policy as the *Royal Proclamation of 1763*. It should affirm the nature of existing treaty relationships as well as the continuity of the treaty process. It should embody the living commitment of the Crown to fulfilling its relationship with treaty nations.

We see a new royal proclamation as the symbolic turning point in the relationship between Aboriginal peoples and other Canadians. The proclamation would

- reaffirm and endorse the basic principles of the *Royal Proclamation of 1763*;
- acknowledge the injuries of the past, when Aboriginal rights were ignored, treaties were undermined and the *Indian Act* was imposed, and express Canadians' regret for policies that deprived Aboriginal peoples of their lands

and often interfered with their family relationships, spiritual practices, structures of authority and relationship with the land;

- express the will of the government of Canada to achieve reconciliation so that Aboriginal people can embrace their Aboriginal and Canadian citizenship without reservation;
- commit the Crown to implementing and renewing existing treaties and making new treaties;
- recognize that Métis people, as one of the Aboriginal peoples recognized in section 35 of the *Constitution Act, 1982*, are included in the federal responsibilities set out in section 91(24) of the *Constitution Act, 1867*;
- commit the Crown to recognizing the inherent right of governance of Aboriginal nations and the jurisdiction of Aboriginal governments as one of three orders of government in Canada and to implementing a process for this recognition;
- commit governments and institutions that act in the name of the Crown to honour Aboriginal and treaty rights;
- recognize fundamental principles defining the nature of Aboriginal title (see Chapter 4); and
- commit the Crown to honourable redress for breaches of its honour in its past dealings with Aboriginal peoples in Canada.

We emphasize the importance of the intervention of the reigning monarch to give weight to these undertakings. For many treaty nations, the relationship with the monarch is real, personal and enduring. The Crown symbolizes this relationship in the same way as the Pipe and the Two Row Wampum.

The royal proclamation must represent the commitment of Canada as a whole. The proclamation must transcend partisan politics and regional differences, so there must be a serious attempt to secure the support of provincial and territorial governments. The success of treaty implementation and renewal and of treaty making will require the involvement of the provinces. There must also be wide consultation with the treaty nations and other Aboriginal peoples to ensure that the proclamation is not seen in any way as a pre-emptive measure or a measure that might derogate from any Aboriginal or treaty right.

## 6.2 Companion Legislation

We are aware of the potential for empty symbolism. Without companion legislation, a royal proclamation would change nothing. We also recognize that such a proclamation alone would have no legal effect, regardless of its moral authority. The proposed royal proclamation must therefore be accompanied by appropriate legislation. We propose that the government of Canada recommend that the House of Commons and the Senate, by joint resolution, request Her Majesty to issue the royal proclamation. The companion legislation would then be introduced in Parliament as draft legislation to give substantive symbolic force to the

commitments contained in the Proclamation, as well as giving it legal force. It is obvious that the proclamation should be issued as early as possible to demonstrate the government's clear intentions and that it be accompanied by draft legislation. Here we outline the elements that should be contained in the treaty legislation; other elements of the companion legislation are set out later in this volume and in Volume 5, Chapter 1.

The treaty legislation would set out the guiding principles of the treaty processes and provide for the establishment of the institutions required to implement them. It should also introduce certain reforms of the law in relation to the judicial interpretation of treaties.

The proposed treaty legislation should achieve the following objectives:

- It should provide for the implementation of existing treaty rights, including the rights to hunt, fish and trap.
- It should affirm liberal rules of interpretation of treaties, having regard to the context of treaty negotiations, the spirit and intent of each treaty, and the special relationship between the treaty parties, and acknowledge the admissibility of oral and secondary evidence in the courts to make determinations with respect to treaty rights.
- It should declare the commitment of Parliament and government of Canada to the implementation and renewal of each treaty on the basis of the spirit and intent of the treaty and the relationship embodied in it.
- It should commit the government of Canada to treaty processes to clarify, implement and, where the parties agree, amend the terms of treaties so as to give effect to the spirit and intent of each treaty and the relationship embodied in it.
- It should commit the government of Canada to a process of treaty making with Aboriginal nations that do not yet have a treaty with the Crown and with treaty nations whose treaty does not purport to address land and resource issues.
- It should clarify that defining the scope of governance for Aboriginal and treaty nations is a vital part of the treaties.
- It should authorize establishment of the institutions necessary to fulfil the treaty processes in consultation with treaty nations, as discussed in greater detail later in this chapter and in Chapter 4.

It is vital that these unilateral acts of the Crown not be perceived by Aboriginal peoples as a breach of the treaty relationship. It is therefore essential that the proposed proclamation and its companion legislation be the subject of thorough discussion and consultation with Aboriginal peoples and provincial and territorial governments before they are introduced.

The royal proclamation would supplement the written text of the constitution and would form part of the constitution as the *Royal Proclamation of 1763* does now.



Thus far, we have addressed only federal legislation. However, without complementary provincial legislation and territorial ordinances authorizing those governments to participate in treaty processes, it will be impossible to achieve their objectives, particularly with respect to lands and resources. There is a particular obligation on the part of provinces to participate, as they have benefited directly from past breaches of the treaties. In addition, the *Constitution Act, 1867* and the transfer of lands and resources to the western provinces by the government of Canada in the 1930s may have made land available to the provinces that ought to have remained with Aboriginal peoples. Treaties are instruments of reconciliation; it is therefore in the interests of all parties for provincial and territorial governments to participate in these historic processes.

The Commission also respects the views of many treaty nations that continue to look to the international arena for fulfilment of their treaties. In proposing Canadian treaty processes, in no way is the Commission attempting to exclude continuing dialogue and activity in international bodies concerning Indigenous peoples' rights.

## RECOMMENDATIONS

The Commission recommends that

- Royal 2.2.7  
Proclamation The federal government prepare a royal proclamation for the consideration of Her Majesty the Queen that would
- (a) supplement the *Royal Proclamation of 1763*; and
  - (b) set out, for the consideration of all Aboriginal and treaty nations in Canada, the fundamental principles of
    - (i) the bilateral nation-to-nation relationship;
    - (ii) the treaty implementation and renewal processes; and
    - (iii) the treaty-making processes.
- Federal 2.2.8  
Companion  
Legislation The federal government introduce companion treaty legislation in Parliament that
- (a) provides for the implementation of existing treaty rights, including the treaty rights to hunt, fish and trap;
  - (b) affirms liberal rules of interpretation for historical treaties, having regard to
    - (i) the context of treaty negotiations;
    - (ii) the spirit and intent of each treaty; and
    - (iii) the special relationship between the treaty parties;

- (c) makes oral and secondary evidence admissible in the courts when they are making determinations with respect to historical treaty rights;
- (d) recognizes and affirms the land rights and jurisdiction of Aboriginal nations as essential components of treaty processes;
- (e) declares the commitment of the Parliament and government of Canada to the implementation and renewal of each treaty in accordance with the spirit and intent of the treaty and the relationship embodied in it;
- (f) commits the government of Canada to treaty processes that clarify, implement and, where the parties agree, amend the terms of treaties to give effect to the spirit and intent of each treaty and the relationship embodied in it;
- (g) commits the government of Canada to a process of treaty making with
  - (i) Aboriginal nations that do not yet have a treaty with the Crown; and
  - (ii) treaty nations whose treaty does not purport to address issues of lands and resources;
- (h) commits the government of Canada to treaty processes based on and guided by the nation-to-nation structure of the new relationship, implying:
  - (i) all parties demonstrating a spirit of openness, a clear political will and a commitment to fair, balanced and equitable negotiations; and
  - (ii) no party controlling the access to, the scope of, or the funding for the negotiating processes; and
- (i) authorizes the establishment, in consultation with treaty nations, of the institutions this Commission recommends as necessary to fulfil the treaty processes.

#### Provincial and Territorial 2.2.9

##### Companion Legislation

The governments of the provinces and territories introduce legislation, parallel to the federal companion legislation, that

- (a) enables them to meet their treaty obligations;
- (b) enables them to participate in treaty implementation and renewal processes and treaty-making processes; and
- (c) establishes the institutions required to participate in those treaty processes, to the extent of their jurisdiction.

## 7. CONTENT OF TREATY PROCESSES

We agreed to maintain peace and friendship among ourselves and with the Crown. Peace and friendship can only be nurtured through processes which allow treaty partners to talk and resolve any differences through negotiations and goodwill.

The unique and special relationship which is evidenced by the existence of our treaty places upon both partners a duty to take whatever steps are necessary toward creating mechanisms or processes for resolving difficulties and differences which from time to time will arise in the course of such a relationship....

We seek urgent action aimed at commencing the task of addressing and resolving the many outstanding issues which have arisen in our treaty relationship. We want to make clear our position that treaty framework is a framework we wish to utilize for redressing the many inequities which presently exist. We want the results of that process recognized, affirmed and protected by the Canadian constitution.

Chief Bernie Meneen

High Level Tribal Council

High Level, Alberta, 29 October 1992

Treaty parties will devise the appropriate process for reviewing, implementing and renewing the treaty relationship or for making new treaties. In this section, we provide some guidance on the possible content of treaty processes and the results they may be designed to achieve.

The treaty-making process we envisage represents an evolution from the present comprehensive claims process toward a process that is less exclusionary with respect to the parties and the subject matter of agreements and predicated on the affirmation rather than the extinguishment of Aboriginal title (see Chapter 4).<sup>101</sup>

The Crown saw the historical treaties, as the federal government has seen modern treaties, as one-time final transactions. This perspective must be overcome. The treaties must be acknowledged as living instruments, capable of evolution over time and meaningful and relevant to the continuum of past, present and future. They should not be frozen as of the day they are signed.

### 7.1 Entry to be Voluntary

No treaty nation can or should be compelled to enter a new process. If a treaty nation wishes to leave its treaty relationship as it is, the nation's right to remain apart from a process that in its view might derogate from its treaty should be respected.

Commissioners heard many treaty nation leaders, elders and members tell us not to tamper with their sacred treaties. Commissioners respect that view. No aspect of any treaty should be discussed, let alone redefined or amended, without the consent of the treaty parties.

It is the Commission's view, however, that what is sacred about the treaties is not the specific provisions, which we believe the parties can agree to change, but rather the continuing relationship to which both the Crown and the treaty nations brought their most binding formalities. The relationship is sacred, but the details of the relationship are subject to definition. Indeed, representatives of treaty nations have been consistent in asserting that the treaties were to be renewed regularly and revisited in the light of changing circumstances.

In recommending a process to reconcile the differing understandings of treaties and to engage in a constructive dialogue on issues where agreement was reached, Commissioners do not regard this as tampering with the treaty but rather as giving it life and meaning for today and for the future.

The Commission does not propose renegotiation of the treaties but rather implementation of the spirit and intent of the treaties, including completing them where appropriate or amending the treaty text where the parties acknowledge that it does not embody their true agreement. This respects the rights of the treaty nations to enter into protocols to give greater definition to their rights and obligations under the treaty and to resolve different views the treaty parties may have with respect to those specific rights and obligations.

## 7.2 Timing to be Realistic

Many treaty relationships have fallen into serious disrepair over a period of generations and even centuries. Reversing this trend through renewal of treaty relationships will take considerable time. A generation may well have passed before both treaty parties feel that the true principles of their treaty have been restored. The parties should be realistic about the size of the task ahead and the time needed to complete it.

It is important that the proposed royal proclamation contain a clear acknowledgement of the continuing nature of the process and the magnitude of the task. For this reason, the royal proclamation should also commit the agencies of government to short- and medium- term initiatives to give effect to the treaties and to recognize the desirability of providing interim relief in appropriate circumstances.

We also recognize that negotiations may have to take place in stages to accommodate the capacity of governments to address the issues raised. This should be done by agreement, with certain negotiations being identified, with the concurrence of all parties, as 'lead' negotiations.



### 7.3 Long-Term Resources to be Available

Adequate resources for treaty-making and treaty implementation and renewal processes should be made available to treaty nations, with sufficient long-term predictability to permit their relationship with the Crown to be repaired and restored gradually. The treaty legislation should address the question of resources, to provide a legislative foundation for funding. Treaty nations must, of course, be accountable for their expenditure of these public funds.

## RECOMMENDATION

The Commission recommends that

Elements of Treaty 2.2.10

Process The royal proclamation and companion legislation in relation to treaties accomplish the following:

- (a) declare that entry into treaty-making and treaty implementation and renewal processes by Aboriginal and treaty nations is voluntary;
- (b) use clear, non-derogation language to ensure that the royal proclamation and legislation do not derogate from existing Aboriginal and treaty rights;
- (c) provide for short- and medium-term initiatives to support treaty implementation and renewal and treaty making, since those processes will take time to complete; and
- (d) provide adequate long-term resources so that treaty-making and treaty implementation and renewal processes can achieve their objectives.

### 7.4 Nature and Scope of Items for Discussion

It would be entirely inappropriate for the Commission to specify the substantive content of treaty processes, but we would like to provide guidance on some of the issues they should attempt to address.

Some treaty nations have declared that every point of contact between them and the non-Aboriginal people and institutions of Canada is affected in one way or another by the relationships established by their treaties.<sup>102</sup> Certain apparently unimposing items referred to in treaty texts may be emblematic of larger issues that define important components of the treaty relationship. Other issues may be implicit and not mentioned at all in treaty texts. Still other matters, partic-

ularly governance and Aboriginal title, are generally regarded by Aboriginal and treaty nations as fundamental rights not ceded in treaties.

The issues under discussion in treaty-making and treaty implementation and renewal processes could include

- the fundamental purposes, character and scope of the treaty relationship;
- the parties, successors and beneficiaries of the treaties;
- the effect of a treaty, if any, on the Aboriginal right and title to land;
- the adequacy of the land and resource base secured by the treaty;
- economic rights, including treaty annuities and hunting, fishing and trapping rights;
- the rights and obligations of the parties arising from a treaty relationship in a modern context;
- education, health and taxation issues;
- governance and justice issues;
- a determination of the extent to which federal and provincial legislation has extinguished, diminished or infringed upon Aboriginal and treaty rights; and
- disputes based on breaches of legal or fiduciary obligations arising in relation to the Crown's past, present and future administration of Indian lands and assets.

In this volume, we address the basic elements of the new relationships to be forged with all Aboriginal nations in the context of governance (Chapter 3), lands and resources (Chapter 4), and economic issues (Chapter 5). Here we provide a brief explanation of the relevance of these elements to treaty processes. In each case, more complete discussion and substantive recommendations are set out in the relevant chapters.

## Governance

Whether or not the written text of the treaties refers expressly to rights of governance, we can say with certainty that all treaty nations regard themselves as self-governing. Without exception, the treaty nations that testified before the Commission expressed the view – which we accept – that the Crown entered into treaties with treaty nations on the basis that they were self-governing nations with the ability to discharge the treaty obligations they undertook. Thus, treaties acknowledged their jurisdiction over treaty subject matters and by necessary implication over other matters not addressed specifically in a treaty.

In this regard, we will not repeat our earlier comments about governance.<sup>103</sup> We agree with the treaty nations that governance issues are implicit in any treaty relationship. We find that the right of treaty nations to govern themselves was acknowledged implicitly by the Crown. The medals and uniforms provided to chiefs and headmen under many treaties affirm their legitimacy as the

government of the treaty nations. The treaty nations undertook to maintain peaceful relations with settlers. How could they do this without the power to govern themselves?

As discussed fully in the next chapter, the new relationships we foresee are based on the inherent right of Aboriginal nations to act as one of three orders of government in Canada. It is vital that the link between governance and treaties be re-established, including the right to institute Aboriginal justice systems.<sup>104</sup> Thus, it is crucial that existing treaties that are to be implemented and renewed, as well as new treaties yet to be made, address governance powers in explicit terms.

## Lands and resources

In most cases, the treaty nations dispute the written provisions in their treaties that provide for the extinguishment or cession of their Aboriginal rights and title to lands. In the treaties predating 1763, often described as treaties of peace and friendship, land rights are not mentioned, and the treaty nations maintain that their land rights have survived the making of these treaties. For example, Alex Christmas, president of the Union of Nova Scotia Indians, said this during our hearings:

Although we have many treaties, none of them dealt with the surrender of lands and title...

The matter of our traditional lands and resources must be addressed in a manner consistent with the principles underlined in the 1752 treaty and the standards of the treaty-making process laid out in the Royal Proclamation. Canada's current comprehensive claims policy calls for the extinguishment of Aboriginal and treaty rights in return for specific rights granted by the federal settlement legislation. In our view, if future agreements are to provide for coming generations and reflect our unique constitutional relationship with the Crown, they must be based on the recognition of our Aboriginal and treaty rights, not on their extinguishment. We require an adequate land base and equitable access to natural resources if we are to truly join the circle of Confederation.

Alex Christmas  
Union of Nova Scotia Indians  
Eskasoni, Nova Scotia, 6 May 1992

In the case of treaties that the Crown regards as having extinguished Aboriginal land rights and title, there is a treaty nation tradition that the treaty was intended to ensure an equitable sharing of lands and resources. How otherwise could Aboriginal people and settlers live peacefully side by side? The words of Chief George Fern are representative:

We believe the principle of sharing of our homeland [and] its natural resources is the basis of the treaty arrangements, not surrender or extinguishment. Accordingly, the concepts of resource co-management and revenue sharing from the Crown lands and resources are the proper forms of treaty implementation. Such arrangements would provide a significant economic basis for self-government, and would provide First Nations with the ability to protect and benefit from Mother Earth.

Chief George Fern  
Prince Albert Tribal Council  
La Ronge, Saskatchewan, 28 May 1992

As we have seen, the cross-cultural nature of treaty negotiations almost certainly gave rise to a lack of consensus on this vital issue in many instances.<sup>105</sup> It appears that many of the historical treaties did not secure the voluntary cession of Aboriginal title, even though the Crown intended this result and even though the legal language of the written treaty texts recorded a cession.

We reached some key conclusions with respect to the historical treaties that contain blanket extinguishment provisions. We do not suggest that these conclusions apply in precise fashion to every treaty. Rather, we set them out as emerging from the overall pattern of treaty making in Canada.

First, the historical treaties are agreements and as such are subject to the basic principles of contract law, with additional guidance being derived from the international law principles governing treaties. Even a cursory survey of the treaties reveals numerous ways that contract law could be invoked to call into question the extinguishment of Aboriginal land rights. The common law of contracts already recognizes certain categories of contracts – unconscionable contracts, contracts made in writing but that do not embody one party's consent, contracts made under duress, and contracts that have been fundamentally breached – all of which attract specific, well-established doctrines of invalidation. In our view, these doctrines are applicable to many of the treaties. They are also flexible enough to be adapted to the *sui generis* aspects of the treaties that make them different from other agreements.

Second, the historical treaties were made in the context of what is now seen as a fiduciary relationship between the parties, and where they involve a cession of Aboriginal title they must bear particular scrutiny. As a fiduciary, the Crown must account for any unfair or improper benefit derived from appropriating Aboriginal title without clear consent or without making sure that the treaty nations were fully informed. The Crown owed conflicting duties to the treaty nations and to Canadians generally and must bear an onus of clear and plain proof that the extinguishment of Aboriginal land rights occurred properly, that is, that there was not only free but also informed consent to the extinguishment on the part of the Aboriginal parties.



Third, throughout the period when historical treaties that purport to extinguish Aboriginal title were being made, the Crown had the power to extinguish Aboriginal title without the consent of Aboriginal people, but this would have required a clear and plain legislative intention to do so. There was no such legislative authority for what was done.

Fourth, the historical treaties were meant to be enduring. Both parties have formally affirmed that they rely upon them. As we have discussed, the unique nature of the treaties implies a relationship of partnership, including mutual obligations to deal with each other in good faith. These obligations do not permit either party to draw back from the treaty relationship or from the duties that flow from it. The clarification of these rights and duties must therefore be the subject of good faith negotiations so that consensus can be reached on the respective rights and obligations of the parties.

If it flows from these four conclusions that in many instances the historical treaties did *not* result in the voluntary cession of Aboriginal title, that title may well continue to exist over the large portion of the Canadian land mass dealt with in the numbered treaties. This result, already contemplated by the trial decision in *Paulette*, would place the land regime in the parts of Canada covered by the treaties of cession in the same position as most of British Columbia, the Atlantic provinces, certain parts of the Northwest Territories and Quebec, as well as other areas where the Crown never attempted to obtain a cession of Aboriginal title.<sup>106</sup>

The parties to the historical treaties already have a treaty relationship that prohibits them from engaging in certain conduct and requires them to deal with one another honourably and in good faith. The treaty relationship establishes affirmative obligations on the parties to complete the treaties and at the same time restrains them from conduct that is inconsistent with treaty principles. Treaties provide a framework for the peaceful resolution of disputes.

In Chapter 4, we set out our detailed recommendations for a more equitable sharing of lands and resources through treaty processes. An adequate land base is essential to the economic and cultural health of Aboriginal peoples and to the viability of Aboriginal governments. It is the Commission's view that the treaty nations intended to enter into treaties that would provide for this result, and only such an outcome would meet the standards of fairness imposed by the relationship we envisage.

## Economic rights

In addition to providing for sharing lands and natural resources, the treaty nations regard the historical treaties as creating an economic relationship between themselves and the Crown. As with the political components of the treaty relationship, the economic aspects will evolve with time and with changing circumstances. These are also matters for treaty implementation and renewal processes (see Chapter 5).

Similarly, new treaties will be deeply concerned with economic issues. Not only will lands and natural resources be an issue, but other provisions to enable Aboriginal nations to benefit from economic opportunities will have to be addressed as well.

### *Treaty annuities*

One example of economic rights in the historical treaties is the practice of paying annuities. The Robinson treaties of 1850 and the numbered treaties made after 1870 provide for annual annuities to be paid to each member of a treaty nation. Today, many treaty nation members travel great distances to collect their treaty annuity on treaty day because of the symbolic value of meeting with the Crown's representatives to renew the treaty and affirm the continuing nature of the treaty relationship.

With the passage of time, the value of these annuities, typically \$4 or \$5 per year, has been severely eroded. The dollar amount specified in the original treaty is still distributed annually. The annuities established by the Robinson treaties, for example, represented between one-half and one-third of the annual wage of an unskilled labourer.<sup>107</sup> Annuities could also increase if revenues derived from the territory affected by the treaty rose. Treaty 1 provided for the annuity to be "made in such articles as the Indians shall require of blankets, clothing, prints (assorted colours), twine, or traps, at the current cost price in Montreal, or otherwise, if Her Majesty shall deem the same desirable in the interests of Her Indian people, in cash".<sup>108</sup>

The growth of the modern social safety net eventually brought larger infusions of resources. The treaty nations insist that all transfers of resources to them are in fact being made pursuant to treaty. We agree that the treaty promises of wealth transfer should be reconsidered in treaty implementation and renewal processes.

### *Hunting, fishing and trapping*

Similarly, the Robinson treaties and the numbered treaties contain assurances that the traditional economic activities of hunting, fishing and trapping would be preserved. The words used to record these rights in the treaties varied, however, and extensive litigation has subsequently produced many anomalies in interpretation.

In addition, in some cases these rights have been abrogated unilaterally by the Crown or affected by regulations that breach the letter and spirit of the treaty promises. In the prairie provinces, for example, the Natural Resources Transfer Agreements of the 1930s altered treaty rights to hunt, fish and trap, and recent cases indicate that these treaty rights may indeed have been extinguished without the consent of treaty nations and replaced with a more limited set of rights.<sup>109</sup> Provincial game and fish laws and regulations have been applied to

treaty nations people without regard for their treaty rights, and for decades federal laws such as the *Fisheries Act* and *Migratory Birds Convention Act* have criminalized essential harvesting activities guaranteed by treaty (see Chapter 4).<sup>110</sup> These issues are overdue for consideration in treaty implementation and renewal processes, particularly given their central importance to the economic well-being and cultural integrity of treaty nations.

### *Other economic issues*

The Crown's other promises of economic assistance were often expressed in the treaties by reference to the provision of fish hooks and nets, ammunition, or agricultural equipment and seeds. These items, humble as they may seem, represent the undertaking of an economic relationship. They represent the Crown offering economic development aid in exchange for peaceful coexistence and the sharing of territory.

In Chapter 5, we address the economic issues facing treaty nations and other Aboriginal peoples today and suggest some ways for the Crown to provide assistance in a modern context.

### *Other treaty issues*

Individual treaties raise other issues that might be the subject of treaty processes. Just as ordinary items such as fish hooks and twine represent continuing commitments of economic aid, other references to apparently simple matters may signify important commitments in the treaty relationship.

Each of the numbered treaties, for example, provides specifically for rights to education. These are sometimes expressed in the form of a simple requirement to provide a school or a teacher, but when taken together with the oral record and understanding of the treaty nation, they entitle treaty nations people to be educated so that they can earn a living in today's world (see Volume 3, Chapter 5).

Education was regarded as vital to give children the means to maintain and develop their culture and identity while at the same time acquiring the skills necessary to survive and flourish in the context of the new settler society. The treaty right cannot, therefore, be seen as limited to the salary of a teacher, the construction of a school building, or the purchase of a few books. We regard education as a proper subject for treaty processes.

The text of Treaty 6 provides for a "medicine chest".<sup>111</sup> Treaty nations of Treaty 6 have maintained consistently that the medicine chest provision means that full medical care was to be provided under their treaty. Other treaty peoples regard full medical care as implicit in their treaty relationship, having been discussed at the time of treaty.

The people of Treaty 8 were concerned that the treaty would lead to an enforced change in their way of life because of the imposition of taxes. They were



assured by the treaty commission that this would not occur, but this assurance was not properly recorded in the written version of the treaty.<sup>112</sup>

Many treaty nations regard their immunity from taxation by the governments of Canada and the provinces as an implicit treaty right. They refer to section 90 (1) (b) of the *Indian Act*, which deems personal property “given to Indians or to a band under a treaty or agreement between a band and Her Majesty” to be “situated on reserve”, thus exempting it from taxation by virtue of section 87 of the act. A revised assessment of the scope of treaty rights and obligations will conceivably have an impact on the extent of the exemption of treaty nations from taxation.

First Nations that do not have reserve land, as well as Métis people and Inuit, do not benefit from this limited exemption from tax. The present legislative exemption applies only to status Indians who can demonstrate close links between personal property (including income) and a reserve.<sup>113</sup> Despite section 87, virtually all Aboriginal adults in Canada pay some taxes to all levels of government, and the overwhelming majority cannot take advantage of the tax exemption described in the *Indian Act*.

The legislation also draws a sharp distinction between economic activity on- and off- reserve. The Commission believes that taxation issues, like governance, must be clarified and formalized to permit a clear and predictable regime for intergovernmental relations in the future. We believe that Aboriginal governments should benefit from the immunity from taxation now enjoyed by federal and provincial government property, as guaranteed by section 125 of the *Constitution Act, 1867*.

We believe that explicit treaty-based taxation regimes should combine intergovernmental exemptions from taxation with new and enhanced powers of Aboriginal governments to tax people living on their territory, including their own members, and economic activity taking place on their territories (see Chapters 3 and 5). For these reasons, we regard taxation as an appropriate subject for treaty processes.

We believe that all discretionary payments, transfer payments and program funding should be examined in the context of the treaty discussions. Whether these payments are made now pursuant to an explicit treaty right, legislation or discretionary policy, they should come under close scrutiny in light of the treaty relationship. Many government programs now administered on the basis of need may in fact be a matter of treaty entitlement. There is a difference between collecting welfare and receiving dividends from investments. New treaties and renewed treaties should make these distinctions explicit.

Through treaty processes, and over time, treaty nations can begin to realize a real transfer of power and resources in their favour in fulfilment of the treaty relationship.



Our report contains many recommendations that could be implemented through treaty implementation and renewal processes. In making new treaties, the parties are free to fashion any arrangements they wish. No issue should be left off the negotiating table arbitrarily.

## RECOMMENDATION

The Commission recommends that

Matters for 2.2.11

Negotiation The following matters be open for discussion in treaty implementation and renewal and treaty-making processes:

- governance, including justice systems, long-term financial arrangements, including fiscal transfers, and other inter-governmental arrangements;
- lands and resources;
- economic rights, including treaty annuities and hunting, fishing and trapping rights;
- issues included in specific treaties (for example, education, health and taxation); and
- other issues relevant to treaty relationships identified by either treaty party.

## 7.5 Outcomes of Treaty Processes

Section 35(1) of the *Constitution Act, 1982* states that the “existing...treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed”. In other words, it gives constitutional protection to treaty rights, although it is not their source. Their source is the treaties themselves. Section 35 (3) was added by a constitutional amendment in 1983. It extends the definition as follows:

For greater certainty, in subsection (1) “treaty rights” includes rights that now exist by way of land claims agreements or may be so acquired.

This amendment makes it clear that the existing treaty rights referred to in section 35(1) include rights contained in past treaties as well as rights contained in treaties yet to be made. It also makes it clear that land claims agreements past and future are a form of treaty.

Parties to a treaty should be free to modify or supplement it. In theory they can even renegotiate the treaty if they come to the conclusion that the current

treaty inadequately describes their relationship.<sup>114</sup> In virtually every case, however, we believe that treaty nations will not wish to renegotiate their historical treaties but will want to achieve an understanding of the real terms of those treaties and then to implement that understanding. The treaty nations that have entered into modern treaties may be more likely to ask for renegotiation, but as we discussed earlier, they may also risk more than the other parties if that occurs.

Commissioners strongly recommend to treaty parties that they put their agreements in writing and that they include in them dispute resolution mechanisms that can be invoked by either or both treaty parties.

It is important to set out clearly the relationship between the original treaty and any treaty implementation and renewal agreement to define or supplement the rights contained in the original treaty. It might be argued that the existing treaty rights are constitutionally entrenched and thus immutable. But such an approach would distort the essential nature of treaties, which is that they create continuing relationships capable of growth, amendment and clarification as the parties desire.

### Protocol agreement

The most common outcome of treaty implementation and renewal will be a formal protocol agreement that defines specific treaty rights and obligations, perhaps for specified periods of time, with clearly defined mechanisms for review and renegotiation of the elements covered by the agreement.

Such a protocol could state specifically that it is not a treaty but simply an intergovernmental agreement of a lesser nature that governs and, for certain purposes, defines rights and obligations derived from a treaty. It could also describe rights that are nonetheless treaty rights within the meaning of section 35(1). This is consistent with section 35(3) of the *Constitution Act, 1982*, which enables a land claims agreement to result in constitutionally protected treaty rights.

Such protocol agreements should be ratified legislatively to remove any doubt with regard to their legal status. This was done, for example, with the James Bay and Northern Quebec Agreement, although now the treaty nation government, as well as Parliament and, if necessary, the relevant provincial legislature, would be expected to pass legislation.<sup>115</sup>

### Supplementary treaty

Alternatively, treaty implementation agreements could be given the status of supplementary treaties that leave the original treaties intact and add to them. From what we have heard, this approach would not likely be the preferred one for many of the treaty nations.

It is possible that implementation and renewal of existing treaties could be achieved in part through a modern interpretation of the original historical

agreement. Items not originally dealt with, or dealt with unsatisfactorily, could be handled in a supplementary treaty.

On the other hand, treaty nations such as the Mi'kmaq and the Haudenosaunee have made a series of separate treaties with the Crown and have expressed a wish to continue the treaty-making process. Any supplementary treaty would coexist with earlier treaties.

### Replacement treaty

A treaty implementation and renewal agreement could consist of a new treaty that terminates and replaces the original treaty. Renegotiation or replacement should be an option for treaty nations that regard their original treaties as fundamentally flawed. This alternative is extremely unlikely to be the choice of many of the treaty nations, however, which have strongly advocated implementation of existing treaties.

We caution that there should be no requirement or expectation that the treaty implementation and renewal process will produce yet another treaty within the meaning of section 35. Since treaty nations believe strongly that their treaties already exist and are complete, it is to be expected that many – and even most – treaty nations will choose to establish implementation protocols.

Regardless of the type of agreement reached, legislation and regulations will likely have to be enacted by the treaty parties to formalize the renewed treaty and to provide for implementation, review and dispute resolution.

## RECOMMENDATION

### The Commission recommends that

#### Outcome of Treaty 2.2.12

##### Processes

- The royal proclamation and companion legislation in relation to treaties provide for one or more of the following outcomes:
- (a) protocol agreements between treaty nations and the Crown that provide for the implementation and renewal of existing treaties, but do not themselves have the status of a treaty;
  - (b) supplementary treaties that coexist with existing treaties;
  - (c) replacement treaties;
  - (d) new treaties; and
  - (e) other instruments to implement treaties, including legislation and regulations of the treaty parties.

## 7.6 Reorganization in Preparation for Treaty Processes

Later in this volume we make a series of major recommendations for restructuring federal government institutions related to Aboriginal affairs (see Chapter 3). Here we deal only with the establishment of government agencies to address treaty processes.

The government of Canada has begun to dismantle the department of Indian affairs, the first step being the signing on 7 December 1994 of a framework agreement between the minister of Indian affairs and northern development and 60 First Nations communities represented by the Assembly of Manitoba Chiefs.<sup>116</sup>

The agreement makes it clear that the dismantling process should restore to First Nations jurisdiction now exercised by other federal departments. Dismantling of the department has been a constant demand from treaty nations for many years. The question that arises is which agencies of the federal Crown will negotiate or maintain liaison with treaty nations in the future. In preparation for treaty renewal, thought must be given to how Crown commitments can be met in the context of a Canada that is not only a constitutional monarchy but a federation.

The Commission uses the term 'the Crown' to mean the repository of the constitutional values of our society that transcend ordinary political arrangements. The Crown is no longer a simple monolithic entity, if indeed it ever was. The Crown represents the Canadian people as well as their governments. It epitomizes the rights and obligations of the Canadian people as a collective whole.

In the present context, the Crown is party to all treaties with treaty nations. These obligations have been assumed by the Crown, and they are now implicit in section 35(1) of the *Constitution Act, 1982*. This is true whether the treaty in question was made by the French Crown, the British Crown, the Crown in right of Canada, or the Crown in right of a province. It is even true, in our view, of treaties made by the Hudson's Bay Company under the Crown's authority, as with the Douglas treaties on Vancouver Island.

The contemporary relationship between the Crown in this sense and the treaty nations is the theme of this chapter. Our use of the term 'the Crown' embodies values, rights and obligations that would survive even the end of the monarchy in Canada, although they are symbolized by the monarchy at present.

### The gradual dispersal of Crown obligations

The Crown has not implemented the spirit and intent of the treaties for many reasons. In part, it was because of different understandings on the part of the Crown's representatives and the treaty nations with respect to the treaties. The dramatic extent of cross-cultural misunderstandings was analyzed earlier.

Increasingly, however, continual reorganizations in government have resulted in trivialization of the treaties because of deliberate policies inimical to



the treaties or sheer ignorance and neglect of the treaties as the source of rights and obligations.

The division of jurisdiction between the federal and provincial orders of government has also resulted in a division of the Crown's duty under the treaties. Indeed, court decisions conclude that these responsibilities belong to different entities entirely. In 1910, Lord Loreburn of the judicial committee of the privy council described the contemporary judicial view of the two separate roles of the federal and provincial Crowns in *Canada v. Ontario*:

The Crown acts on the advice of ministers in making treaties, and in owning public lands holds them for the good of the community. When differences arise between the two Governments in regard to what is due to the Crown as maker of treaties from the Crown as owner of public lands they must be adjusted as though the two Governments were separately invested by the Crown with its rights and responsibilities as treaty maker and as owner respectively.<sup>117</sup>

The Commission is of the view that both federal and provincial governments are required by the honour of the Crown to participate in treaty processes and to give effect to treaty rights and promises. The fulfilment of the Crown's duty is their joint responsibility.

Remarkably, there has never been a department or agency of the government of Canada devoted to the fulfilment of treaties. The mandate of the Department of Indian Affairs and Northern Development (DIAND) is to implement the *Indian Act*. Over time, the federal government's point of contact with treaty nations has been dispersed to a host of departments and agencies, all of which apply federal legislation and policies but none of which has a mandate to address the whole array of issues arising from treaties. The rights that flow from the *Indian Act* have been accorded greater prominence than Aboriginal or treaty rights.

The result is that the original nation-to-nation treaty relationship has dissolved into a complex relationship between the governments of treaty nations (more accurately, individual band councils) and a host of federal and provincial government entities. In the process, the treaty relationship has been lost sight of.

### A Crown treaty office

The organization required to enable the government of Canada to fulfil its obligations under the treaties is an important matter. In our view, DIAND cannot legitimately serve this role. The legacy remaining from the flawed relationship of the past makes the department largely incapable of implementing a new relationship. The creation of a Crown Treaty Office within a new Department of Aboriginal Relations will ensure that a department of the government of Canada has, for the first time, an unambiguous mandate to identify and implement treaty rights and obligations and to make new treaties. This will reverse the trend that

has diminished the relevance of the treaties. In Chapter 3, we discuss in detail the structure and mandate of the proposed Department of Aboriginal Relations and the place of the Crown Treaty Office within it.

A Crown Treaty Office would assume the responsibilities of the Crown in right of Canada in implementing and renewing and making treaties and would co-ordinate the Crown's participation in treaty implementation and renewal. The role of the Crown Treaty Office should be mentioned in the royal proclamation and its functions set out in the companion legislation. It must have a clear and prominent place in the federal government.

For the reasons discussed later in this volume, the Crown Treaty Office should be insulated from the program delivery responsibilities now exercised by DIAND. The implementation of treaty terms, which often involve multiple federal entities, should be overseen, directed and managed by the Crown Treaty Office. Its senior official, the chief Crown negotiator, will take direction from specific negotiation mandates given by cabinet to the minister of Aboriginal relations and from the work of other branches of the new Department of Aboriginal Relations.

## RECOMMENDATION

The Commission recommends that

### Crown Treaty 2.2.13

Office

The royal proclamation and companion legislation in relation to treaties:

- (a) establish a Crown Treaty Office within a new Department of Aboriginal Relations; and
- (b) direct that Office to be the lead Crown agency participating in nation-to-nation treaty processes.

## The role of provincial governments

The terms of Confederation complicated the task of identifying the Crown as a party to treaties. Under the constitution, and subject to the *Canadian Charter of Rights and Freedoms* and the constitutionally protected rights of Aboriginal peoples, the provinces are sovereign within their spheres of jurisdiction.

The rights and obligations described in the treaties have implications for the provinces, and it is clear that treaty implementation and treaty making will engage many areas of provincial legislative competence and proprietary rights. Treaty processes will require provincial Crown lands and resources to be made

available to provide for a reasonable sharing of the natural resource wealth of the country. Provincial laws that now apply to Aboriginal and treaty nations people and lands will have to be modified to make room for Aboriginal governance. As a result, successful treaty processes will require the active co-operation and participation of provincial governments as an integral component of the Crown. This is why we recommended that the provinces introduce legislation to enable them to meet their treaty obligations and participate in treaty processes (see Recommendation 2.2.9 earlier in this chapter).

Some treaties that were made between treaty nations and the undivided Crown must now be implemented by a Crown that acts through two constitutional orders of government. In addition, under the constitution, Parliament has legislative authority and the government of Canada has executive responsibility for the treaty relationship. As many treaty nations people describe it, the relationship between treaty nations and the provinces is government-to-government, while the relationship between treaty nations and the Crown in right of Canada is nation-to-nation.

Federal and provincial responsibility to meet treaty obligations must be clarified and implemented to eliminate federal/provincial disputes over cost sharing. To achieve this, some overall federal/provincial cost-sharing arrangements will have to be made (see Volume 4, Chapter 7). Recent experience suggests that these arrangements can in fact be achieved. Two examples are the 1992 Saskatchewan Treaty Land Entitlement Framework Agreement and the financial components of the British Columbia treaty process.<sup>118</sup>

The Commission proposes that provincial governments organize themselves, possibly through legislation parallel to the federal treaty legislation, in a way similar to the proposed Crown Treaty Office, with provincial offices being established as negotiating agencies responsible to provincial governments and legislatures.

In many provinces, agencies dedicated to Aboriginal relations already exist.<sup>119</sup> In no case has a provincial government established an agency with a mandate to implement the provincial government's responsibilities with regard to the treaties or enter into new treaties. Existing provincial agencies tend to be small policy development and co-ordination offices or branches of larger ministries. Substantive responsibility (and consequent authority) for lands, resources and myriad other matters continues to be vested in line ministries.

There is good reason to think that provincial governments are subject in law to the Crown's fiduciary duties to Aboriginal and treaty nations.<sup>120</sup> They are obliged to respect Aboriginal rights and are subject to the burdens of treaty rights. In addition, in many cases provincial governments have been enriched by the federal government's breaches of treaty obligations, particularly in relation to land or the failure of the Crown to enter into a treaty relationship with Aboriginal nations. As a matter of equity and honour, provincial governments should feel a particular responsibility to ensure that Aboriginal people secure a fully adequate land base.

## RECOMMENDATION

The Commission recommends that

- Provincial 2.2.14  
 Participation Each province establish a Crown Treaty Office to enable it to participate in treaty processes.

## 7.7 Reorganization of Aboriginal and Treaty Nations

In Chapter 3 of this volume we discuss the major issues of governance for Aboriginal peoples. We describe the harm that has been done to traditional Aboriginal governing structures, and we recognize the need for new governing bodies. These themes are of particular importance in the context of treaty processes.

This Commission cannot determine which entities can legitimately represent treaty nations in treaty processes. In many cases, treaty nation representation may not be an issue. In other cases, there may be competing entities that claim standing to represent Aboriginal and treaty nations. In Chapter 3, we discuss the need for a federal policy on recognition of Aboriginal nations.

This crucial issue has the potential to paralyze treaty processes at the outset. Many of these issues stem from Canada's legislative creation, through the *Indian Act*, of band council governments exercising delegated power, as opposed to Aboriginal and treaty nation governments. The government of Canada thus created much of the problem and should assume some role in its solution.

### What is an Aboriginal or treaty nation?

Authentic renewal of treaty relationships will require realignment not only on the part of the Crown but also on the part of Aboriginal and treaty nations. Each Aboriginal and treaty nation must ultimately determine for itself the route that it will take to a reconstituted nation government, but we feel obliged to make some observations and identify potential pathways to renewal. Later in this volume, we address the rebuilding of Aboriginal nations in more detailed terms (see Chapter 3). Here we address in a preliminary fashion the link between nationhood and treaties.

The *Royal Proclamation of 1763* refers, significantly, to "Nations or Tribes of Indians". Consistent with this designation, the vast majority of historical treaties – in their written versions – refer to particular nations or tribes. These terms are a reflection of historical fact and British imperial practice. As we saw in our review of history, both the British and the French conducted Indian policy



on the assumption that their Aboriginal counterparts possessed the political, territorial and economic characteristics of nationhood.

An Aboriginal or treaty nation is an indigenous society, possessing its own political organization, economy, culture, language and territory. The Supreme Court of the United States identified some of these characteristics of nationhood in *Cherokee Nation v. State of Georgia*:

The numerous treaties made with them by the United States recognize them as a people capable of maintaining the relations of peace and war; of being responsible in their political character for any violation of their engagements, or for any aggression committed on the citizens of the United States by any individual of their community.<sup>121</sup>

More than 140 years after this judgement, the International Court of Justice attacked the concept of *terra nullius* in its advisory opinion on the Western Sahara, noting that "at the time of colonization Western Sahara was inhabited by peoples which, if nomadic, were socially and politically organized in tribes and under chiefs competent to represent them."<sup>122</sup>

We have already referred to recognition by Chief Justice Marshall and Justice McLean of the U.S. Supreme Court that the terms 'treaty' and 'nation' were European in origin and that the only prerequisite to a valid treaty is that both parties be self-governing and capable of carrying out the treaty's stipulations.

## Displacement and deconstruction of the Indian nations as policy

Britain acknowledged the nationhood of the Indian nations at an early stage and made undertakings of non-interference with internal matters. At the same time, this recognition was often undermined by the imperatives of political and economic expediency. Intertribal and intratribal rifts were often encouraged or exacerbated by Crown agents to advance imperial or local policy objectives. As a result, the treaty-making process, which began on an explicitly nation-to-nation basis, became more ambiguous in time as the government of Canada undermined the integrity of the Aboriginal nations with which it had treaty relations.

Interference with Aboriginal political structures entered a new and more formalized stage with the federal government's adoption of the consolidated *Indian Act* in 1876. Despite the fact that the Crown was still engaged in treaty making on the basis of nationhood or at least tribal organization, the act identified bands as the legal embodiment of Indian political structure.<sup>123</sup> Moreover, bands and their membership were defined by the act, which gave the responsible minister authority to recognize and even to create bands and to divide their membership and assets. The act not only provided a legislative basis for the denial of Indian nationhood, but also recast the relationship between Indian people and the Crown in administrative instead of political terms.

As discussed in Volume 1, the *Indian Act* was intended to hasten the assimilation, civilization and eventual annihilation of Indian nations as distinct political, social and economic entities. It was not intended as a mechanism for embracing the Indian nations as partners in Confederation or for fulfilling the responsibilities of the treaty relationship. Rather, it focused on containment and disempowerment – not by accident or by ignorance, but as a matter of conscious and explicit policy. The breaking up of Aboriginal and treaty nations into smaller and smaller units was a deliberate step toward assimilation of Aboriginal individuals into the larger society.

After almost 120 years, the *Indian Act* has taken its toll – not only in the quality and the basis of the relationship between Indian nations and the Crown, but also with respect to the internal organization of the Indian and treaty nations. In the next chapter, we examine in detail the approaches Aboriginal nations may choose to pursue to reclaim and reconstruct their nationhood.

## 8. INSTITUTIONS FOR TREATY PROCESSES

There should be an independent body to oversee violations of the treaties. This body could be formed by Indigenous peoples and the Crown, and have the authority to approve fines and penalties against the treaty violator. The violators could be individuals, corporations or governments. All would be subject to the jurisdiction of this body.

There has never been any independent body in Canada to oversee the implementation of the treaties. In other Commonwealth countries that have treaties with the indigenous peoples, the state governments have tried to unilaterally implement their own form of treaty resolution. One which immediately comes to mind is the New Zealand model known as the Waitangi Tribunal. We have our own version in Canada known as the Office of the Treaty Commissioner. Each of these bodies was modelled after the American Indian Claims Commission. In the United States and in New Zealand these bodies have serviced their political masters and not the Indigenous peoples. We must strive for something which serves us.

Regena Crowchild  
President, Indian Association of Alberta  
Edmonton, Alberta, 11 June 1992

What may be required is an institution that would ensure the Crown's full compliance with its responsibilities and obligations. This could take a number of forms, but a key would be to place treaty implementation and treaty making outside the realm of partisan politics,

with an institution whose mandate would be to uphold the honour of the Crown, not to cater to the whims of political expediency.

Alex Christmas

President, Union of Nova Scotia Indians

Eskasoni, Nova Scotia, 6 May 1992

The restoration of the treaty relationship through the making of new treaties and the implementation and renewal of existing ones will require the establishment of at least two types of independent and neutral institutions: treaty commissions and a specialized Aboriginal Lands and Treaties Tribunal. Their functions would be quite distinct, but both will be vital to the success of the proposed treaty processes.

To be legitimate in the eyes of treaty nations, these institutions must be established through consultation and negotiation with the Aboriginal and treaty nations. They must also be genuinely independent of federal and provincial governments. Finally, they can have no authority to affect any rights of Aboriginal and treaty nations that have not given their clear consent to the creation of these institutions or accepted their roles.

As a result, although this chapter has concerned steps the Crown should take to meet its unfulfilled obligations, the present discussion must be more general, in that the treaty parties must consult and agree on the institutions required to move the relationship forward.

## 8.1 Treaty Commissions

Throughout the history of Canada, commissions have been established to negotiate treaties with Aboriginal nations. The term commission has been used from time to time to refer to the negotiating teams appointed by the Crown and, more recently, to bodies established to facilitate treaty discussions and negotiations. It is the latter meaning we use here.

Treaty commissions should be established by the government of Canada, the appropriate provinces and territories, and Aboriginal and treaty nations. These commissions would be permanent, independent and neutral forums where negotiations as part of treaty processes can take place. They should be established on a regional basis as required, the most obvious and useful structure being along provincial or territorial lines, although the possibility of using treaty boundaries should also be explored.<sup>124</sup>

A number of such entities now exist, including the B.C. Treaty Commission and the Saskatchewan Office of the Treaty Commission. The commissions would assist the treaty parties to resolve political and other disputes arising in treaty processes. Their mandate would be to eliminate both substantive and procedural obstacles within treaty processes.

Treaty commissions must not be simply administrative structures. What is required is the creation of an *environment* that will promote and permit treaty

## **Eighteenth-Century Treaty Commissions: The Council Houses**

In the summer of 1764, Sir William Johnson held a great congress with 24 Indian nations at Niagara. When a peace was made, Sir William extended the Covenant Chain to the nations of the Western Confederacy. His home at Fort Johnson on the Mohawk River, in what is now New York state, became the first permanent imperial council house, permanently stocked with provisions. Its outbuildings were sleeping quarters and meeting places. The shady area in front of the house was ideal for open-air councils. The home of Johnson the individual became inseparable from the council house of Johnson the representative of the Crown.

After the Revolutionary War, Lieutenant Governor John Graves Simcoe of Upper Canada envisioned a permanent council house in his capital city of London, on the Thames River. On September 1, 1794, he wrote to Lord Dorchester:

That as soon as conveniently it can be executed, a Council House should be erected for this purpose at the proposed seat of Government, London, particularly adapted as central to the Indian Nations; that there the Indian [peoples] should be assembled to receive their regular presents, with all due form and solemnity under His Majesty's Picture or Statue; that they may be taught to repose in security on their Great Father, consider him and not his Officers or Agents as their benevolent benefactor – That to this fire-place, a deputation of all their Chiefs should be annually invited to resort, to reconcile their respective differences, to receive advice, and to renew their friendship with the King's People, which they are sufficiently acquainted is indispensable for their common protection.

Simcoe's council house would have served as a place of safety and neutrality and, more important, as a concrete symbol of the relationship between the Treaty nations and the Crown. Unfortunately, it did not come into being.

*Source:* Paul Williams and Curtis Nelson, "Kaswentha", research study prepared for RCAP (1994), quoting from *The Correspondence of Lieut. Governor John Graves Simcoe*, ed. E.A. Cruikshank (Toronto: Ontario Historical Society, 1925).

processes to succeed. Treaty commissions would provide the entire range of services necessary to foster and facilitate the success of talks.



## RECOMMENDATIONS

### The Commission recommends that

- Treaty 2.2.15  
Commissions The governments of Canada, relevant provinces and territories, and Aboriginal and treaty nations establish treaty commissions as permanent, independent and neutral bodies to facilitate and oversee negotiations in treaty processes.

#### 2.2.16

The following be the essential features of treaty commissions:

- Commissioners to be appointed in equal numbers from lists prepared by the parties, with an independent chair being selected by those appointees.
- Commissions to have permanent administrative and research staff, with full independence from government and from Aboriginal and treaty nations.
- Staff of the commissions to act as a secretariat for treaty processes.
- Services of the commissions to go beyond simple facilitation. Where the parties require specialized fact finding of a technical nature, commissions to have the power to hire the necessary experts.
- Commissions to monitor and guide the conduct of the parties in the treaty process to ensure that fair and proper standards of conduct and negotiation are maintained.
- Commissions to conduct inquiries and provide research, analysis and recommendations on issues in dispute in relation to historical and future treaties, as requested jointly by the parties.
- Commissions to supervise and facilitate cost sharing by the parties.
- Commissions to provide mediation services to the parties as jointly requested.
- Commissions to provide remedies for abuses of process.
- Commissions to provide binding or non-binding arbitration of particular matters and other dispute resolution services, at the request of the parties, consistent with the political nature of the treaty process.

Above all, treaty commissions must respect the political and even diplomatic nature of treaty processes. They must be and be seen to be independent of the parties. They cannot legitimately have any authority to resolve disputes unless such authority is conferred on them by both parties.

Treaty commissions will serve as the guardians or keepers of treaty processes. To give them the best chance of achieving this status, there must be full and open consultations with Aboriginal and treaty nations before the Crown brings them into being. Corresponding laws or resolutions of Aboriginal and treaty nations would then be required before treaty commissions could be considered a legitimate part of individual treaty negotiations.

## 8.2 An Aboriginal Lands and Treaties Tribunal

There will be a need to resolve disputes within treaty processes. As we have shown, a treaty process is political by nature. In chapter 4 we recommend establishment of an Aboriginal Lands and Treaties Tribunal. We have considered carefully the relationship between the tribunal, which would be a court-like and adjudicative body, and the institutions necessary to ensure success in a political process. Our concern is the relationship between the tribunal, which would have a broad mandate to hear and decide disputes, and the profoundly political nature of a treaty process.

Many treaty nations' representatives have expressed concern about the present role of the courts in adjudicating treaty issues. The courts are seen as a product of the Crown's legal and political system and as such are perceived as lacking legitimacy to address questions arising from a nation-to-nation political relationship. Others, however, have asked us to respond to the shortcomings of the court system by recommending establishment of a judicial body with binding authority but one that would be more detached from the Crown's legal and political traditions.

We recommend that the tribunal play a supporting role in treaty processes, with three main elements in its mandate. First, the tribunal should have jurisdiction over process-related matters such as ensuring that the parties negotiate in good faith. Second, the tribunal should have the power to make orders for interim relief. Third, the tribunal should have jurisdiction to hear appeals on funding issues.<sup>125</sup>

The tribunal would be a forum of last resort in treaty processes, and every attempt should be made to provide for the negotiated, mediated or arbitrated resolution of treaty disputes with the assistance of treaty commissions, which would have primary responsibility for ensuring that treaty processes are kept moving and on track.

The existence of the tribunal should not shape treaty processes. Its jurisdiction over treaty processes should be limited to deciding particular matters that might otherwise have been litigated in court and to acting as an appellate body

in relation to certain functions of the treaty commissions. Most important, in the treaty processes the tribunal must be only one of an array of dispute-resolution mechanisms available to the treaty parties.

## RECOMMENDATION

### The Commission recommends that

#### Aboriginal Lands 2.2.17

##### and Treaties Tribunal

The Aboriginal Lands and Treaties Tribunal recommended by this Commission (see Volume 2, Chapter 4) play a supporting role in treaty processes, particularly in relation to

- (a) issues of process (for example, ensuring good-faith negotiations);
- (b) the ordering of interim relief; and
- (c) appeals from the treaty commissions regarding funding of treaty processes.

## NOTES

1. *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at 1099.
2. Peter Cumming and Neil Mickenberg, *Native Rights in Canada* (Toronto: General Publishing, 1972), p. 331.
3. *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 at 289-90 (1954), Reed J.
4. The following studies were conducted as part of the research program of the Royal Commission on Aboriginal Peoples [RCAP]: Stephen Aronson and Ronald C. Maguire, "Federal Treaty Policy Study" (1994); Russel Lawrence Barsh and James Youngblood Henderson, "International Context of Crown-Aboriginal Treaties in Canada" (1995); Harold Cardinal, "Treaty 8 – A Case Study" (1994); Denys Delâge et al., "Les autochtones de la Nouvelle France et du Québec : XVI<sup>e</sup> - XX<sup>e</sup> siècles" (1995), which includes the following studies: Denys Delâge, "Les échanges culturels dans l'alliance franco-amérindienne, 1600-1760" (1995), Marc Jetten, "La reconnaissance et l'acquisition de la propriété autochtone en Amérique du Nord (du XVII<sup>e</sup> et XIX<sup>e</sup> siècles) : Le cas des nations domiciliées du Canada" (1993), Jean-Pierre Sawaya, "Les sept nations du Canada : traditions d'alliance dans le nord-est, XVIII<sup>e</sup> et XIX<sup>e</sup> siècles" (1994), and Régent Sioui, "Les enjeux contemporains au Québec" (1994); Peter W. Hutchins and Anjali Choksi, "Renouncing the Old Rules of the Game: Crown Conduct in the Context of Litigation Involving Aboriginal

Peoples" (1994); Peter Russell and Roger Jones, "Aboriginal Peoples and Constitutional Reform" (1995); Andr  e Lajoie et al., *Le statut juridique des autochtones au Qu  bec et le pluralisme* (Cowansville, Quebec:   ditions Yvon Blais, 1996), which includes the following studies: Andr  e Lajoie, "Synth  se introductive", Jean-Maurice Brisson, "L'appropriation du Canada par la France de 1534    1760 ou les rivages inconnus du droit", Sylvio Normand, "Les droits des Am  rindiens sur le territoire sous le R  gime fran  ais", Andr  e Lajoie and Pierre Verville, "Les trait  s d'alliance entre les Fran  ais et les Prem  res Nations sous le R  gime fran  ais", and Alain Bissonnette, "L'influence du R  gime fran  ais sur le statut et les droits des peuples autochtones du Canada : relecture critique de la jurisprudence"; Rene M.J. Lamothe, "'It Was Only a Treaty': A Historical View of Treaty 11 According to the Dene of the Mackenzie Valley" (1993); Yngve Georg Lithman, "The Feathers of a Bird and the Frosts of Winter: Portability of Treaty Rights in an Era of Restraint and Off-Loading" (1994); Joseph Eliot Magnet, "M  tis Land Rights in Canada" (1993); Louise Mandell and E. Ann Gilmour, "Land Rights of the M  tis" (1994); James Morrison, "The Robinson Treaties of 1850: A Case Study" (1994); John Olthuis and H. W. Roger Townshend, "Is Canada's Thumb on the Scales?: An Analysis of Canada's Comprehensive and Specific Claims Policies and Suggested Alternatives" (1995); Delia Opekokew, "The Inherent Right of Self-Government as an Aboriginal and Treaty Right" (1994); Louise Mandell, "B.C. Issues" (1993); Alan Pratt, "Discussion Paper Regarding the Natural Resources Transfer Agreements of the Prairie Provinces" (1994); Alan Pratt, "The Numbered Treaties and Extinguishment: A Legal Analysis" (1995); D.N. Sprague, "Administrative History of M  tis Claims" (1994); Thalassa Research, "Nation to Nation: Indian Nation-Crown Relations in Canada" (1994); Frank Tough and Leah Dorion, "'The claims of the half-breeds...have been finally closed': A Study of Treaty Ten and Treaty Five Adhesion Scrip" (1993); Sharon H. Venne, "Final Report on Treaty 6 Case Study" (1994); Bill Wicken, "An Overview of the 18th Century Treaties Signed Between the Mi'kmaq and Wuastukwiuk Peoples and the English Crown, 1725-1928" (1993); Paul Williams and Curtis Nelson, "Kaswentha" (1995); and James Youngblood Henderson, "Land in British Legal Thought" (1994). For information about research studies prepared for RCAP, see *A Note About Sources* at the beginning of this volume.

5. We use the term 'myth' here in the sense used by Douglas Sanders in *Aboriginal Self-Government in the United States* (Kingston: Institute of Intergovernmental Relations, Queen's University, 1985), p. 2.

A major myth in United States Indian law is the concept that elements of inherent tribal sovereignty have continued from the point of first contact with Europeans. I call it a myth, for it is difficult to see how the concept was respected in the periods of removal, allotment and termination. It is a myth in the most positive sense of being a concept designed to instruct and give meaning to people and institutions. The myth has allowed the transformation of institutions.



6. Alexis de Tocqueville, *Democracy in America*, trans. George Lawrence, ed. J.P. Mayer, Volume 1 (New York: Harper & Row, Publishers, 1988), p. 339.
7. *Constitution Act, 1982*, s. 35(1).
8. *Constitution Amendment Proclamation, 1983*, s. 35(3).
9. A notable and valuable exception is the high school text by Richard Price, *Legacy: Indian Treaty Relationships* (Edmonton: Plains Publishing Inc., 1991).
10. See also RCAP, *Partners in Confederation: Aboriginal Peoples, Self-Government, and the Constitution* (Ottawa: Supply and Services, 1993).
11. *R. v. Secretary of State for Foreign and Commonwealth Affairs, ex parte Indian Association of Alberta*, [1982] 2 All E.R. 118 at 124, Lord Denning MR. Lord Denning quotes from a 1794 New Brunswick treaty with the Mi'kmaq.
12. *Simon v. The Queen*, [1985] 2 S.C.R. 387 at 404.
13. For a harrowing account of genocide in the Americas see David E. Stannard, *American Holocaust: Columbus and the Conquest of the New World* (New York: Oxford University Press, 1992).
14. See Russel Lawrence Barsh and James Youngblood Henderson, "Aboriginal Rights, Treaty Rights, and Human Rights: Indian Tribes and 'Constitutional Renewal'", *Journal of Canadian Studies* 17/2 (1982), pp. 55-81.
15. A notable example is the case of *Sandra Lovelace v. Canada*, a 1981 decision of the United Nations Human Rights Committee under Article 5(4) of the *Optional Protocol to the International Covenant on Civil and Political Rights*. The decision is reproduced at [1982] 1 C.N.L.R. and concluded that section 12(1)(b) of the *Indian Act* was in violation of several articles of the covenant. Bill C-31 repealed that provision in 1985.
16. See *Pawis v. The Queen*, [1980] 2 F.C. 18 (1979) 102 D.L.R. (3d) 602 (F.C.T.D.).
17. See *Francis v. The Queen*, [1956] S.C.R. 618.
18. *Simon* (cited in note 12) at 404.
19. *Vienna Convention on the Law of Treaties*, UN Doc. A/CONF.39/27 (1969).
20. *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29 at 36, Dickson J.
21. *R. v. Sioui*, [1990] 1 S.C.R. at 1044.
22. *Sioui* at 1038.
23. *Ontario (A.G.) v. Bear Island Foundation*, [1991] 2 S.C.R. 570 at 575.
24. *Sparrow* (cited in note 1) at 1075.
25. *Sparrow* at 1109.
26. *R. v. Taylor and Williams* (1982), 34 O.R. (2d) 360 at 367, MacKinnon A.C.J.O.
27. *Sparrow* (cited in note 1) at 1108.

28. *Taylor* (cited in note 26) at 364.
29. *Sioui* (cited in note 21) at 1045.
30. *Jones v. Meehan*, 175 U.S. 49 (1899).
31. *Sioui* (cited in note 21) at 1036.
32. The Supreme Court of Canada has indicated that this language can no longer be accepted. See *Simon* (cited in note 12) at 400.
33. *R. v. Howard*, [1994] 2 S.C.R. 299 at 306-307 [references omitted]. *Howard* involved the question of whether a treaty made in 1923 had extinguished a pre-existing treaty right to fish. The circumstances surrounding the 1923 treaty negotiations are troubling, in part because the treaty commissioners rejected a request by legal counsel for the Aboriginal parties to be heard during the public hearings. Furthermore, there is no evidence that the legal implications of the treaty were explained to the Aboriginal signatories, by the treaty commissioners or anyone else, when the treaty was signed.
34. *Eastmain Band v. Canada*, [1993] 1 F.C. 501 at 518 (F.C.A.). Leave to appeal to Supreme Court of Canada denied, [1993] 3 S.C.R. vi. Sébastien Grammond, in "Aboriginal Treaties and Canadian Law" (1994) 20 Queen's L.J. 57 at 74-75, has criticized the decision because it ignores the fact that the Crees were essentially compelled to negotiate because the Quebec Court of Appeal had, in *Société de développement de la Baie James v. Kanatewat*, [1975] C.A. 166, dissolved the injunction granted by Justice Malouf of the Superior Court ([1974] Que. P.R.) and because the decision does not refer to the fiduciary duty of the Crown that may have been created by the extinguishment of Aboriginal rights by the Agreement. See also Sébastien Grammond, *Les traités entre l'État canadien et les peuples autochtones* (Cowansville, Que.: Les Éditions Yvon Blais Inc., 1995), p. 129.
35. *R. v. Horse*, [1988] 1 S.C.R. 187 at 201-202.
36. *Horse* at 203.
37. *Sioui* (cited in note 21) at 1046. The judgment of Bisson J.A. is reported at [1987] R.J.Q. 1722 at 1729.
38. Brian Slattery, "Understanding Aboriginal Rights" (1987) 66 Can. Bar Rev. 727 at 734-735.
39. S.M. Waddams, *The Law of Contracts*, 3rd ed. (Toronto: Canada Law Book Inc., 1993), pp. 217-18 [emphasis added].
40. *R. v. Bartleman* (1984), 55 B.C.L.R. 78 at 92 (C.A.).
41. *Bartleman* at 88.
42. *Black's Law Dictionary*, 6th ed. (St. Paul, Minn.: West Publishing Co., 1990), p. 40.
43. *Horseman v. The Queen*, [1990] 1 S.C.R. 901 at 907.
44. *R. v. Batisse* (1978), 19 O.R. (2d) 145 at 151 (Dist. Ct.).

45. *R. v. Tennisco* (1981), 131 D.L.R. (3d) 96 at 105 (Ont. S.C.).
46. *Simon* (cited in note 12) at 404.
47. See D.J. Harris, *Cases and Materials on International Law*, 3rd ed. (London: Sweet & Maxwell, 1983), p. 608. Material breach is defined in Article 60 (3) as
  - (a) a repudiation of the treaty not sanctioned by the present Convention;  
or
  - (b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.
48. *Bear Island Foundation* (cited in note 23) at 570.
49. *Ontario (A.G.) v. Bear Island Foundation* (1989), 68 O.R. (2d) 394 at 419 (Ont. C.A.).
50. Leading cases such as *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 Appeal Cases 46 (Judicial Committee of the Privy Council) were decided without any participation by the Aboriginal peoples whose rights were under discussion. In addition, from 1927 to 1951, the *Indian Act* made it an offence for band funds to be used for litigation. See the *Indian Act*, R.S.C. 1927, chapter 98, section 141, and Volume 1, Chapter 9 of this report.
51. *Delgamuukw v. British Columbia (A.G.)*, [1993] 5 C.N.L.R. 1 at 254-55, Lambert J.A.
52. *Secretary of State for Foreign and Commonwealth Affairs* (cited in note 11) at 129-30.
53. *Johnson v. M'Intosh*, 5 U.S. (8 Wheaton) 543 at 573-74, Marshall C.J. (1823). For further discussion of these issues see Robert A. Williams, *The American Indian in Western Legal Thought: The Discourses of Conquest* (New York: Oxford University Press, 1990).
54. In the case of the Crown, we regard the recognition and affirmation of existing treaty rights in section 35(1) of the *Constitution Act, 1982* as conclusive of the Crown's affirmation.
55. *Sioi* (cited in note 21) at 1045.
56. Article 44(3) of the Vienna Convention (cited in note 19) provides that a party may as a general rule only invalidate, terminate, withdraw from or suspend the operation of a treaty as a whole, and may only do so in relation to particular clauses if
  - (a) the said clauses are separable from the remainder of the treaty with regard to their application;
  - (b) it appears from the treaty or is otherwise established that acceptance of those clauses was not an essential basis of the consent of the other party or parties to be bound by the treaty as a whole; and
  - (c) continued performance of the remainder of the treaty would not be unjust.

Article 45 of the Vienna Convention provides that a state may not invalidate, terminate or withdraw from a treaty if, after becoming aware of the certain facts that might justify those actions:



- (a) it shall have expressly agreed that the treaty is valid or remains in force or continues in operation, as the case may be; or
  - (b) it must by reason of its conduct be considered as having acquiesced in the validity of the treaty or in its maintenance in force or in operation, as the case may be.
57. See Alan Pratt, "The Numbered Treaties and Extinguishment: A Legal Analysis", research study prepared for RCAP (1995).
  58. See Pratt, "The Numbered Treaties".
  59. *New Zealand Maori Council v. Attorney-General* (1987), 1 N.Z.L.R. 641 at 664 (C.A.) [emphasis added].
  60. *New Zealand Maori Council* at 682.
  61. *New Zealand Maori Council* at 703.
  62. See RCAP, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (Ottawa: Supply and Services, 1996).
  63. RCAP, *Treaty Making in the Spirit of Co-existence: An Alternative to Extinguishment* (Ottawa: Supply and Services, 1995).
  64. Elders of Treaty 7: Walter Hildebrandt, Dorothy First Rider, and Sarah Carter, *The Spirit and Intent of Treaty 7* (Treaty 7 Tribal Council, Tsuu T'ina, Alberta, 1993), p. 6.
  65. RCAP, *Treaty Making in the Spirit of Co-existence* (cited in note 63), p. 17.
  66. RCAP, *Treaty Making in the Spirit of Co-existence*, p. 57.
  67. See Pratt, "The Numbered Treaties" (cited in note 57).
  68. *Worcester v. State of Georgia*, 8 U.S. (6 Peters) 515 at 559-561 (1832).
  69. *Worcester v. State of Georgia* at 581.
  70. See *Re Paulette and Registrar of Land Titles No. 2* (1973), 42 D.L.R. (3d) 8 at 40: "That notwithstanding the language of the two treaties there is sufficient doubt on the facts that aboriginal title was extinguished that such claim for title should be permitted to be put forward by the Caveators." This decision was subsequently overturned on technical grounds (related to the availability of the caveat) that do not affect the point here.
  71. Many examples can be given here. In *Treaty No. 8 made June 21, 1899 and Adhesions, Reports, etc.* (Ottawa: Queen's Printer, 1966), the treaty commissioners for Treaty 8 recorded a promise that no taxation would be permitted, but this was not included in the treaty text. The report on the negotiations leading to Treaty 3, *Treaty No. 3 between Her Majesty the Queen and the Saulteaux Tribe of the Ojibbeway Indians at the Northwest Angle on the Lake of the Woods with Adhesions* (Ottawa: Queen's Printer, 1966), included mention that the wild rice harvest was to be protected, but again this was not included in the treaty text.
  72. Few if any treaties made in Canada explicitly address the rights of the treaty nations to govern themselves. Implicitly, however, the power to fulfil the treaty promises requires that the treaty nations be self-governing.



73. *Bear Island Foundation* (cited in note 23) might be such a case.
74. See *R. v. Batisse* (quoted earlier in the chapter and cited in note 44) in relation to *The James Bay Treaty: Treaty No. 9 (made in 1905 and 1906), and Adhesions made in 1929 and 1930* (Ottawa: Queen's Printer, 1964).
75. For example, see transcripts of the hearings of the Royal Commission on Aboriginal Peoples [hereafter RCAP transcripts] for the following: Brian Lee, Hobbema, Alberta, 10 June 1992; Chief Lindsay Cyr and Felix Musqua, Saskatoon, Saskatchewan, 28 October 1992; Johnson Sewepegaham, Chief Bernie Meneen and Harold Cardinal, High Level, Alberta, 29 October 1992; François Paulette, Yellowknife, Northwest Territories, 9 December 1992; and Gregg Smith and Dorothy First Rider, Lethbridge, Alberta, 25 May 1993, among others.
76. In our view this remains true even in cases where the government of a province has signed a treaty. See in this context *R. v. Batisse* (cited in note 44) at 148-49 in relation to Treaty 9 and *R. v. Howard* (cited in note 33) in relation to the 1923 Williams treaties.
77. *Edwards v. Canada (A.G.)* (1929), [1930] A.C. 124 at 136.
78. This is the direct result of the landmark decision of the High Court of Australia in *Mabo v. Queensland* (1992), 107 A.L.R. 1.
79. As provided in *The Appropriations Act*, 25 U.S.C. § 71 (1871): "No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; *Provided, further*, That nothing herein contained shall be construed to invalidate or impair the obligation of any treaty heretofore lawfully made and ratified with any such Indian nation or tribe." See Felix S. Cohen, *Handbook of Federal Indian Law* (Charlottetown, Virginia: Michie, Bobbs-Merrill, 1982), p. 107.
80. The U.S. Constitution, Article II, section 2(2) provides that the president "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur." This has always been held to include treaties with Indian tribes; see, for example, *Fellows v. Blacksmith*, 60 U.S. (19 Howard) 366 at 372 (1856).
81. First Ministers Conference: The Rights of Aboriginal Peoples, Ottawa, April 2-3, 1985, "Notes for an Opening Statement by the Right Honourable Brian Mulroney, Prime Minister of Canada", at 7-8.
82. Frank Oberle, P.C., M.P., "Treaty 8 Renovation – Discussion Paper," January 31, 1986. This paper has never been formally published, yet with the consent of the minister was widely circulated for discussion purposes in March 1986.
83. See Harold Cardinal, RCAP transcripts, High Level, Alberta, 29 October 1992.
84. See the RCAP transcripts for the following: Tribal Council of High Level, Alberta, 29 October 1992; Treaty 7 Tribal Council, Lethbridge, Alberta, 25 May 1993; and Federation of Saskatchewan Indian Nations, Saskatoon, Saskatchewan, 28 October 1992.

85. Meeting of the First Ministers and Aboriginal and Territorial Leaders, "Charlottetown Accord – Draft Legal Text, October 9, 1992", s. 35.6(2)-(6). This text did not receive formal approval from governments before the referendum vote in October 1992.
86. See *Creating Opportunity: The Liberal Plan for Canada* (Ottawa: Liberal Party of Canada, 1993), p. 98:

A Liberal government will seek the advice of treaty First Nations on how to achieve a mutually acceptable process to interpret the treaties in contemporary terms, while giving full recognition to their original spirit and intent.

In a news release on 8 October 1993, the Liberal Party of Canada called for the creation of a land claims commission with the following functions:

To report regularly to Parliament; to facilitate claims negotiations; to establish time frames; to develop criteria for validating claims; *to inquire into the need to clarify or renovate treaties to make their express terms consistent with their spirit and intent*; and to have an ongoing role in the implementation of claims agreements. [emphasis added]
87. *The Dismantling of the Department of Indian Affairs and Northern Development, the Restoration of Jurisdictions to First Nations Peoples in Manitoba and Recognition of First Nations Governments in Manitoba – Framework Agreement*, 7 December 1994, s. 5(5.3).
88. Mohawk Councils of Akwesasne, Kahnawake and Kanesatake, letter to RCAP, 27 January 1995.
89. Mohawk Councils of Akwesasne, Kahnawake and Kanesatake, "A Joint Statement on the Inherent Right of Self-Determination and the Exercise of that Right by Akwesasne, Kahnawake and Kanesatake", (1995).
90. *Declaration of Intent*, 16 March 1995.
91. *Aboriginal Self-Government: The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government* (Ottawa: Public Works and Government Services, 1995), p. 8.
92. See *Yukon First Nations Self-Government Act*, S.C. 1994, c. 35; see also Department of Indian Affairs and Northern Development, *Comprehensive Land Claims Policy* (Ottawa: Supply and Services, 1986), p. 18: "As a matter of policy, most aspects of [negotiated self-government] arrangements will not receive constitutional protection unless a constitutional amendment to this effect is in force".
93. DIAND, *Comprehensive Land Claims Policy*, p. 12.
94. The *Simon* (cited in note 12) and *Sioui* (cited in note 21) decisions involved such treaties, in the context of section 88 of the *Indian Act*. While the Supreme Court of Canada has yet to hold specifically that a treaty of peace and friendship gives rise to constitutionally protected rights, there is no reason to think that the court will depart from its earlier findings.

95. The Grand Council of Micmacs, the Union of Nova Scotia Indians and the Native Council of Nova Scotia, *The Mi'kmaq Treaty Handbook* (Sydney, N.S.: Native Communications Society of Nova Scotia, 1987), p. i.
96. See Wendy Moss, "Inuit Perspectives on Treaty Rights and Governance Issues", in RCAP, *Aboriginal Self-Government: Legal and Constitutional Issues* (Ottawa: Supply and Services, 1995), p. 95.
97. *Nunavut Land Claims Agreement Act*, S.C. 1993, c. 29, brought into force 10 June 1993. This agreement not only settled the comprehensive land claim to the eastern Arctic but enabled the establishment of the new territory of Nunavut as well. See *Nunavut Act*, S.C. 1993, c. 28.
98. Inuit Tapirisat of Canada, RCAP transcripts, Ottawa, 3 November 1993.
99. *Sahtu Dene and Metis Comprehensive Land Claim Agreement* (Ottawa: Public Works and Government Services, 1993).
100. Among the many references to the Royal Proclamation in the leading court cases, see *The King v. Lady McMaster*, [1926] Ex. C. R. 68 at 72-74; *Easterbrook v. The King*, [1931] S.C.R. 210 at 214-15 and 217-18; *Calderv. British Columbia (A.G.)*, [1973] S.C.R. 313 at 394-401, Hall J.; *Guerin v. The Queen*, [1984] 2 S.C.R. 335 at 383, Dickson J.; *Sioui* (cited in note 21) at 1063-64; and *R. v. Secretary of State for Foreign and Commonwealth Affairs* (cited in note 11).
101. See also RCAP, *Treaty Making* (cited in note 63).
102. This is generally true of the treaty nations that are party to the numbered treaties. Having said this, it must be recognized that the treaty nations that are parties to early peace and friendship treaties do not regard their treaties as having attempted to define a comprehensive relationship with the Crown.
103. See Chapter 3 of this volume and RCAP, *Partners in Confederation* (cited in note 10), pp. 11-14, 16-19.
104. See RCAP, *Bridging the Cultural Divide* (cited in note 62).
105. See Pratt, "The Numbered Treaties" (cited in note 57) and Volume 1, Chapters 4 and 5.
106. In British Columbia, until recently (the Nisga'a agreement being the most noteworthy example), there has been no attempt to obtain a cession of Aboriginal title, and a treaty-making process has been established. In the Atlantic provinces, there are numerous treaties of peace and friendship that do not purport to affect Aboriginal title. In the Northwest Territories some comprehensive claims have been settled and others have been in negotiation for many years. In Quebec some comprehensive claims have been settled and others are in negotiation.
107. See James Morrison, "Robinson Treaties of 1850: A Case Study", research study prepared for RCAP (1993).
108. *Treaties 1 and 2 between Her Majesty the Queen and the Chippewa and Cree Indians of Manitoba and Country Adjacent with Adhesions* (Ottawa: Queen's Printer, 1957).

109. See Alan Pratt, "Discussion Paper Regarding the Natural Resources Transfer Agreements of the Prairie Provinces", research study prepared for RCAP (1994).
110. The *Migratory Birds Convention Act* was repealed and replaced in 1994 by the *Migratory Birds Convention Act, 1994*, S.C. 1994, chapter 22 to address this difficulty. It now includes a 'non-derogation' clause to protect Aboriginal and treaty rights from its provisions. Amendments to the international agreement in question, the Migratory Birds Convention, are currently under negotiation by the states party to the convention to address this concern.
111. *Copy of Treaty No. 6 between Her Majesty the Queen and the Plain and Wood Cree Indians and Other Tribes of Indians at Fort Carlton, Fort Pitt and Battle River with Adhesions* (Ottawa: Queen's Printer, 1964).
112. See "Report of Commissioners for Treaty No. 8" [22 September 1899], in *Treaty No. 8* (cited in note 71), p. 6.
113. See *Williams v. Canada*, [1992] 1 S.C.R. 877.
114. See Bill Nothing, RCAP transcripts, Sioux Lookout, Ontario, 1 December 1992, regarding the position of the Nishnawbe-Aski Nation with respect to the issue of renegotiating Treaty 9:

In the past they have talked about renegotiating or renovating the treaty. However, when the draft Memorandum of Understanding was presented to the chiefs in 1985, all reference to the treaty was removed at the request of the chiefs. The MOU [memorandum of understanding] process is not a treaty-based initiative.

Despite the written text of the treaty, First Nations did not agree to surrender land. One judge, who is involved in the RCNE [Royal Commission on the Northern Environment] litigation case stated that we had a claim which may not yet have been legally recognized to the ownership of a vast area of land.

The treaty will remain intact and all options for dealing with the treaty are still open to NAN [Nishnawbe-Aski Nation]. Work on legal challenges for the treaty, treaty implementation or treaty interpretation, can and should continue.

115. For a discussion of the status of the James Bay and Northern Quebec Agreement in light of the federal and provincial legislation that ratified and incorporated the agreement, see the article and book by Sébastien Grammond (cited in note 34). See also *Nunavut Land Claims Agreement Act* (cited in note 97), s. 4.
116. See *The Dismantling of the Department of Indian Affairs* (cited in note 87).
117. *Dominion of Canada v. Province of Ontario*, [1910] A.C. 637 at 645.
118. See *Saskatchewan Treaty Land Entitlement Framework Agreement between the Government of Canada, the Entitlement Bands and the Province of Saskatchewan*, 22 September 1992, E98 C6 C2 (Sask.); and *Memorandum of Understanding between Canada and British Columbia Respecting the Sharing of Pre-Treaty Costs, Settlement*



*Costs, Implementation Costs and the Costs of Self-Government* (Vancouver: Ministry of Aboriginal Affairs, 21 June 1993).

119. See the following domestic governance case studies commissioned by the RCAP research program: Peter Aucoin and Violet Paul, "Canadian Governments and Aboriginal Peoples Project: Province of Nova Scotia" (1995); Kathy Brock, "Relations with Canadian Domestic Governments: Manitoba" (1995); David Cameron and Jill Wherrett, "New Relationship, New Challenges: Aboriginal Peoples and the Province of Ontario" (1995); Ken Coates, "First Nations and the Yukon Territorial Government: Toward a New Relationship" (1993); John Crossley, "Relations Between the Province and Aboriginal Peoples in Prince Edward Island" (1995); Gurston Dacks, "Canadian Governments and Aboriginal Peoples: The Northwest Territories" (1995); G. Bruce Doern, "The Politics of Slow Progress: Federal Aboriginal Policy Processes" (1994); Paul J. Dudgeon and Thomas Dore, "Domestic Governance Project: Regina Government Study" (1993); Renée Dupuis, "The Government of Quebec and Aboriginal Self-Government" (1995) [translation]; Roger Gibbons, Sonia Arrison and Jennifer Stewart, "Domestic Governments and Aboriginal Peoples: The Alberta Case" (1995); Robert Gravel, "Relations entre les gouvernements municipaux de la région de Québec et le village des Hurons-Wendat" (1995); David Milne, "The Case of New Brunswick-Aboriginal Relations" (1995); Darcy A. Mitchell and Paul Tennant, "Government to Government: Aboriginal Peoples and British Columbia" (1994); Ken Rasmussen, "Canadian Governments and Aboriginal Peoples: The Case of Saskatchewan/Aboriginal Relations" (1995); and Adrian Tanner et al., "Aboriginal Peoples and Governance in Newfoundland and Labrador" (1994).
120. See the following research studies prepared for RCAP: S. James Anaya, Richard Falk and Donat Pharand, *Canada's Fiduciary Obligation to Aboriginal Peoples in the Context of Accession to Sovereignty by Quebec*, Volume 1, *International Dimensions*, and Renée Dupuis and Kent McNeil, Volume 2, *Domestic Dimensions* (Ottawa: Supply and Services, 1995); and Patrick Macklem, "Normative Dimensions of the Right of Aboriginal Self-Government", in *Aboriginal Self-Government* (cited in note 96).
121. *Cherokee Nation v. State of Georgia*, 5 Peters (1831) at 1-2.
122. *Western Sahara Advisory Opinion*, [1975] I.C.J. Reports at 39.
123. For example, Treaty No. 6 (cited in note 111) of 1876 was made with the 'Plain and Wood Cree Indians'.
124. This is the suggestion made by the Assembly of First Nations in "Reclaiming Our Nationhood, Strengthening Our Heritage", a brief submitted to RCAP in 1993. For information about briefs submitted to RCAP, see *A Note About Sources* at the beginning of this volume.
125. A major part of the tribunal's role would be resolving disputes of a specific claims nature that, for whatever reason, the Aboriginal parties choose to have settled outside the broader treaty implementation and renewal or treaty-making processes. A detailed description of this aspect of the tribunal's proposed responsibilities is set out in Chapter 4.

# 3

## GOVERNANCE

IN THE TIME BEFORE *there were human beings on Earth, the Creator called a great meeting of the Animal People.*

*During that period of the world's history, the Animal People lived harmoniously with one another and could speak to the Creator with one mind. They were very curious about the reason for the gathering. When they had all assembled together, the Creator spoke.*

*"I am sending a strange new creature to live among you," he told the Animal People. "He is to be called Man and he is to be your brother.*

*"But unlike you he will have no fur on his body, will walk on two legs and will not be able to speak with you. Because of this he will need your help in order to survive and become who I am creating him to be. You will need to be more than brothers and sisters, you will need to be his teachers.*

*"Man will not be like you. He will not come into the world like you. He will not be born knowing and understanding who and what he is. He will have to search for that. And it is in the search that he will find himself.*

*"He will also have a tremendous gift that you do not have. He will have the ability to dream. With this ability he will be able to invent great things and because of this he will move further and further away from you and will need your help even more when this happens.*

*"But to help him I am going to send him out into the world with one very special gift. I am going to give him the gift of the knowledge of Truth and Justice. But like his identity it must be a search, because if he finds this knowledge too easily he will take it for granted. So I am going to hide it and I need your help to find a good hiding-place. That is why I have called you here."*

*A great murmur ran through the crowd of Animal People. They were excited at the prospect of welcoming a new creature into the world and they were honoured by the Creator's request for their help. This was truly an important day.*

*One by one the Animal People came forward with suggestions of where the Creator should hide the gift of knowledge of Truth and Justice.*

*"Give it to me, my Creator," said the Buffalo, "and I will carry it on my hump to the very centre of the plains and bury it there."*

*"A good idea, my brother," the Creator said, "but it is destined that Man should cover most of the world and he would find it there too easily and take it for granted."*

*"Then give it to me," said the Salmon, "and I will carry it in my mouth to the deepest part of the ocean and I will hide it there."*

*"Another excellent idea," said the Creator, "but it is destined that with his power to dream, Man will invent a device that will carry him there and he would find it too easily and take it for granted."*

*"Then I will take it," said the Eagle, "and carry it in my talons and fly to the very face of the Moon and hide it there."*

*"No, my brother," said the Creator, "even there he would find it too easily because Man will one day travel there as well."*

*Animal after animal came forward with marvellous suggestions on where to hide this precious gift, and one by one the Creator turned down their ideas. Finally, just when discouragement was about to invade their circle, a tiny voice spoke from the back of the gathering. The Animal People were all surprised to find that the voice belonged to the Mole.*

*The Mole was a small creature who spent his life tunnelling through the earth and because of this had lost most of the use of his eyes. Yet because he was always in touch with Mother Earth, the Mole had developed true spiritual insight.*

*The Animal People listened respectfully when Mole began to speak.*

*"I know where to hide it, my Creator," he said. "I know where to hide the gift of the knowledge of Truth and Justice."*

*"Where then, my brother?" asked the Creator. "Where should I hide this gift?"*

*"Put it inside them," said the Mole. "Put it inside them because then only the wisest and purest of heart will have the courage to look there."*

*And that is where the Creator placed the gift of the knowledge of Truth and Justice.<sup>1</sup>*

IN THIS CHAPTER, WE FOCUS ON Aboriginal governance. In the process, we try to uncover some portion of the gift of knowledge of Truth and Justice as it applies to the relationship between Canada and the people who have called it home for hundreds of generations.

Canada's future development must be guided by the fact that there are three orders of government in this country: Aboriginal, provincial and federal. In this chapter, we consider how these three orders of government might evolve in the future. We ask what forms Aboriginal governments might take and how their development can best be fostered. We discuss how they can relate to federal and provincial governments to create a truly vital and flexible federation. As travellers covering new territory, we have found paths that are tentative and sometimes

uncertain. We hope, nevertheless, that our findings will guide others who embark on this important journey.

In this chapter, we highlight the views of Aboriginal people, expressed in the Commission's public hearings, briefs and studies. We begin this section by examining Aboriginal perspectives on sovereignty, self-determination and self-government. We then explore traditional Aboriginal concepts of governance and the visions that Aboriginal people hold of self-government in contemporary society.

Next, we analyze the legal and political principles that underlie and inform the emergence of an Aboriginal order of government in Canada. We discuss the right of self-determination in international law and its application to the Aboriginal peoples of Canada. We consider the status of the inherent right of Aboriginal self-government in the Canadian constitution. We review the legal and political origins of this right and its entrenchment in section 35 of the *Constitution Act, 1982*.

We also describe three basic models of Aboriginal governance that emerged from our hearings and research. These models demonstrate how the basic visions espoused by Aboriginal people might be put into practice. They show what Aboriginal self-government might look like, how it might be financed and how it might relate to the other orders of government.

Finally, we identify the concrete steps needed to restructure the relationship between Aboriginal peoples and Canada. We recommend strategies for Aboriginal people to strengthen the governing capacities of their nations and to establish constructive working relationships with other Canadian governments. We also identify some fundamental reforms to the structure of Canadian governments that are needed to achieve constructive relationships with Aboriginal people and their nations.

Our first step is to provide a common understanding of the basic terms used throughout the chapter.

- *Aboriginal peoples* (in the plural) refers to organic political and cultural entities that stem historically from the original peoples of North America (not collections of individuals united by so-called racial characteristics). The term includes the Indian, Inuit and Métis peoples of Canada.<sup>2</sup>
- *Aboriginal people* means the individuals belonging to the political and cultural entities known as Aboriginal peoples.
- *Aboriginal nation* refers to a sizeable body of Aboriginal people who possess a shared sense of national identity and constitute the predominant population in a certain territory or collection of territories.
- *First Nation* means an Aboriginal nation composed of Indian people.
- *Aboriginal local community* (or simply, local community) refers to a relatively small group of Aboriginal people living in a single locality and forming part of a larger Aboriginal nation or people. The terms First Nation community, Inuit community and Métis community are also used in this sense.



- *Community* (rather than local community, First Nation community and so on) refers to any group with a shared sense of identity or interest. In this broader sense, Aboriginal nations, peoples and local communities are all communities.

## 1. ABORIGINAL PERSPECTIVES

### 1.1 Basic Concepts

As our opening story suggests, human beings are born with the inherent freedom to discover who and what they are. For many Aboriginal people, this is perhaps the most basic definition of sovereignty – the right to know who and what you are. Sovereignty is the natural right of all human beings to define, sustain and perpetuate their identities as individuals, communities and nations.

Many Aboriginal people see sovereignty as much as a human right as a political and legal one. Seen in this way, sovereignty is an inherent human attribute that cannot be surrendered or taken away.

What is sovereignty? Sovereignty is difficult to define because it is intangible, it cannot be seen or touched. It is very much inherent, an awesome power, a strong feeling or the belief of a people. What can be seen, however, is the exercise of Aboriginal powers. For our purposes, a working definition of sovereignty is the ultimate power from which all specific political powers are derived.

Roger Jones, Councillor and Elder  
Shawanaga First Nation  
Sudbury, Ontario, 1 June 1993\*

As an inherent human quality, sovereignty finds its natural expression in the principle of self-determination. Self-determining peoples have the freedom to choose the pathways that best express their identity, their sense of themselves and the character of their relations with others. Self-determination is the power of choice in action.

Self-determination is looking at our desires and our aspirations of where we want to go and being given the chance to attain that...for life itself, for existence itself, for nationhood itself...

René Tenasco, Councillor  
Kitigan Zibi Anishinabeg Council  
Maniwaki, Quebec, 2 December 1992

Self-government is one path Aboriginal people may take in putting the principle of self-determination into effect. Self-government flows from the principle

\* Transcripts of the Commission's hearings are cited with the speaker's name and affiliation, if any, and the location and date of the hearing. See *A Note About Sources* at the beginning of this volume for information about transcripts and other Commission publications.

of self-determination. In its most basic sense, it is the ability to assess and satisfy needs without outside influence, permission or restriction. In a study prepared for the Commission, the Metis Family and Community Justice Services of Saskatchewan asserts the following:

The political movement towards Métis self-government may be understood as a viable alternative to a mainstream political and administrative system that has consistently failed to address our goals and needs. Our desire to control our own affairs should be viewed as a positive step, as an expression of nationhood, built upon a history in which the right to self-determination was never relinquished, in which the governing apparatus will have legitimacy in the eyes of its citizens.<sup>3</sup>

Of course, self-government may take a variety of forms. For some peoples, it may mean establishing distinct governmental institutions on an 'exclusive' territory. For others, it may mean setting up a public government generally connected with modern treaties or land claims agreements. Alternatively, self-government may involve sharing power in joint governmental institutions, with guaranteed representation for the nations and peoples involved. In other instances, it may involve setting up culturally specific institutions and services within a broader framework of public government. We discuss these arrangements in greater detail later in the chapter.

While the terms sovereignty, self-determination and self-government have distinct meanings, they are versatile concepts, with meanings that overlap one another. They are used by different peoples in different ways. Here we explore some of the main ways Aboriginal people use and understand these terms, as shown in the Commission's hearings, briefs and research studies. Later we will offer our own ideas on this matter.

Sovereignty, in the words of one brief, is "the original freedom conferred to our people by the Creator rather than a temporal power."<sup>4</sup> As a gift from the Creator, sovereignty can neither be given nor taken away, nor can its basic terms be negotiated. This view is shared by many Aboriginal people, whose political traditions are infused with a deep sense of spirituality and a sense of the interconnectedness of all things. Such concepts as sovereignty, self-government and the land, which for some Canadians have largely secular definitions, all retain a spiritual dimension in contemporary Aboriginal thinking. Dave Courchene, Jr. alluded to this point in his testimony to the Commission:

The underlying premise upon which all else was based was to recognize and fulfil the spirit of life within oneself and with all others in the circle of individuals, relationship or community and the land. This was achieved through concerted effort on developing the spirit

through prayer, meditation, vision quests, fasting, ceremony, and in other ways of communicating with the Creator.

Dave Courchene, Jr.  
Fort Alexander, Manitoba  
30 October 1992

From this perspective, sovereignty is seen as an inherent attribute, flowing from sources within a people or nation rather than from external sources such as international law, common law or the Constitution. Herb George of the Gitksan and Wet'suwet'en stated:

What is required here is not an inquiry of the current law or international law to determine the source of our rights. What is required here is the recognition that our rights exist in spite of what international law says, in spite of what the common law says, and in spite of what have been the policies of this government to the present day.

If this issue is to be dealt with in a fair way, then what is required is a strong recommendation from this Commission to government that the source of our rights, the source of our lives and the source of our government is from us. That the source of our lives comes from Gitksan-Wet'suwet'en law.

Herb George  
Gitksan-Wet'suwet'en Government  
Commission on Social Development  
Kispiox, British Columbia, 16 June 1992

While Aboriginal sovereignty is inherent, it also has an historical basis in the extensive diplomatic relations between Aboriginal peoples and European powers from the early period of contact onward. In the eyes of many treaty peoples, the fact that the French and British Crowns concluded alliances and treaties with First Nations demonstrates that these nations were sovereign peoples capable of conducting international relations. The president of the Union of Nova Scotia Indians said to the Commission:

We see our right of self-government as an inherent right which does not come from other governments. It does not originate in our treaties. The right of self-government and self-determination comes from the Mi'kmaq people themselves. It is through their authority that we govern. The treaties reflect the Crown's recognition that we were, and would remain, self-governing, but they did not create our nationhood....In this light, the treaties should be effective vehicles for the implementation of our constitutionally protected right to exercise jurisdiction and authority as governments. Self-government can start with the process of interpreting and fully implementing the

1752 Treaty, to build onto it an understanding of the political relationship between the Mi'kmaq people and the Crown.

Alex Christmas  
Eskasoni, Nova Scotia  
6 May 1992

Some interveners spoke of the need for caution in using the term sovereignty. They noted that the word has roots in European languages and political thought and draws on attitudes associated with the rise of the unitary state, attitudes that do not harmonize well with Aboriginal ideas of governance. For example, in some strands of European thought, sovereignty is coloured by theories suggesting that absolute political authority is vested in a single political office or body, which has no legal limits on its power. The classic notion of the sovereignty of Parliament as developed in British constitutional thought reflects such an approach.

This understanding of sovereignty is very different from that held by most Aboriginal people.

I don't even like the word sovereignty because...it denotes the idea that there's a sovereign, a king, or a head honcho, whatever. I don't think that native people govern themselves that way....I think native peoples' government was more of a consultative process where everyone was involved – women, men and children.

Greg Johnson  
Eskasoni, Nova Scotia  
6 May 1992

Gerald Alfred makes similar observations in a study dealing with the meaning of self-government among the Mohawk people of Kahnawake:

The use of the term 'sovereignty' is itself problematic, as it skews the terms of the debate in favour of a European conception of a proper relationship. In adopting the English language as a means of communication, Aboriginal peoples have been compromised to a certain degree in that accepting the language means accepting basic premises developed in European thought and reflected in the debate surrounding the issues of sovereignty in general and Aboriginal or Native sovereignty in particular.<sup>5</sup>

A better term for political authority, Alfred suggests, is the Mohawk word *tewatatowie*, which means 'we help ourselves'. *Tewatatowie* is linked to philosophical concepts embodied in the Iroquois *Kaianerekowa*, or Great Law of Peace. It is understood not only in terms of interests and boundaries, but also in terms of land, relationships and spirituality. The essence of Mohawk sovereignty is harmony, achieved through balanced relationships. This requires respect for the



common interests of individuals and communities, as well as for the differences that require them to maintain a measure of autonomy from one another. For the Mohawk, as for many other Aboriginal peoples, sovereignty does not mean establishing an all-powerful government over a nation or people. It means that the people take care of themselves and the lands for which they are responsible. It means using political power to express the people's will.

Commissioners heard differing views about what Aboriginal sovereignty means for the relationship between Aboriginal peoples and Canada. Some Aboriginal people spoke about degrees of sovereignty and joint jurisdiction. A number of treaty nations used the term 'shared sovereignty' and maintained that their treaties created a confederal relationship with the Crown, or a form of treaty federalism. For example, the Federation of Saskatchewan Indian Nations outlined a vision of shared but equal sovereignties, affirmed by treaties between First Nations and the Crown. This view envisages relations among First Nations governments, provincial governments and the federal government that are based on principles of coexistence and equality.<sup>6</sup>

Others adopt a more autonomous stance. For example, the Mohawk people draw a clear distinction between co-operating with Canada at an administrative level and surrendering sovereignty. They hold that the first does not necessarily involve the second.<sup>7</sup> They consider the freedom to make associations an essential element of self-determination and self-government. The point is elaborated in a joint statement by the Mohawk Council of Akwesasne, Kahnawake and Kanesatake:

We see self-determination and governance as discrete concepts. But by believing that our Nation constitutes a sovereign power, we are not precluding political or economic cooperation with Canada. Self-determination is a right we have and which must be respected, but we recognize that it is a right which operates within the context of a political and economic reality. From our perspective, our right to self-determination is not detrimentally affected by the arrangements and agreements we reach with Canada for the mutual benefit of our peoples. Our position with respect to any agreement must be based upon our assessment of our current capabilities to govern and administer, it in no way derogates from the unlimited right to change those arrangements in the future upon reflection.<sup>8</sup>

The right of self-determination is also a basic concept for Inuit. This right is grounded in their identity as a distinct people, the strong bonds they have with their homelands, and the fact that they have governed themselves on those lands for thousands of years. They call for their rights to be viewed within a human rights framework as opposed to an ethnic rights framework:

If more emphasis was placed on examining the self-government question from a human rights perspective, the dominating principles

would be the universality of human rights and the equality of all peoples. This would lead to a recognition of the right of aboriginal peoples, like other peoples, to self-determination. Self-determination is not defined as an ethnic right internationally. It is a fundamental human right of peoples, not of ethnic groups.<sup>9</sup>

In the eyes of Inuit, self-determination has both international and domestic aspects. Nevertheless, they have clearly indicated that they wish to exercise their right of self-determination mainly through constitutional reform and the negotiation of self-government agreements. Rosemarie Kuptana, former president of Inuit Tapirisat of Canada, has expressed this position as follows:

The implementation of our right to self-determination will be pursued in a cooperative and practical manner with all Arctic States including Canada, but the Inuit agenda is first and foremost premised upon our recognition as a people. We are a people who have been subjected to the sovereignty of Canada without our consent, without recognition of our collective identity as a people and in violation of our right to self-determination under international law. This must be rectified by several initiatives: the negotiation of regional self-government agreements, constitutional entrenchment of the inherent right of self-government, and the full recognition of the right of indigenous peoples to self-determination, under international human rights standards.<sup>10</sup>

Métis people also maintain that they have a right of self-determination as a distinct people. This right forms the background to their assertion of the right to govern themselves and, more generally, to control their own social, cultural and economic development.<sup>11</sup> The Métis right of self-determination arises from their distinctive political history, which has taken different forms in different parts of Canada. For example, the political consciousness of Métis people in western Canada is rooted in the unique character and status of the Métis Nation, which emerged in the prairies during the eighteenth and nineteenth centuries in the course of activities centred on the fur trade and buffalo hunting. The historical dimensions of self-determination are emphasized in a study by the Metis Society of Saskatchewan:

At the outset, it is important to note that our self-determination objectives, through self-government, are not new. Metis history bears witness to a lengthy legacy of struggles aimed at asserting our fundamental right to control our own destiny. In what is now the province of Saskatchewan, for example, ever escalating political, economic, social and cultural disputes between the Metis and the European settlers culminated in the well known Metis resistance to

Ottawa in 1885. Other sites in nineteenth century Western Canada were also scenes of conflict over many of the same issues. As might be expected, while the military conflicts that sometimes erupted were relatively short-lived, the political struggle to protect Métis economic, social and cultural values and goals has persisted.

This enduring theme in our Métis history – that we as a people have struggled against often overwhelming odds to reclaim our traditional Homeland and assert our sense of nationhood – lies behind much of the current drive towards self-government.<sup>12</sup>

Métis people in eastern and central Canada also point to their long-standing and unique history, their position as mediators between First Nations and incoming Europeans and their involvement in the earliest treaties of peace and friendship. They also emphasize the continuity between their own traditions and those of other Aboriginal people.<sup>13</sup>

While they ground their right of self-determination in international law, Métis people see Canada as the main venue for exercising that right.

The Métis Nation, while believing that it possesses the right of self-determination in the context of international law, has consistently pursued the recognition of its autonomy within the confines of the Canadian state and has vigorously advocated the need to negotiate self government arrangements.<sup>14</sup>

Métis organizations have urged Canadian governments to ratify a Métis Nation accord, similar to the Charlottetown Accord of 1992.<sup>15</sup> They have also called for the explicit entrenchment of the inherent right of Métis self-government in the Canadian constitution. Such measures would allow Métis people to negotiate self-government agreements as a “nation within a nation”.<sup>16</sup>

In summary, while Aboriginal people use a variety of terms to describe their fundamental rights, they are unanimous in asserting that they have an inherent right of self-determination arising from their status as distinct or sovereign peoples. This right entitles them to determine their own governmental arrangements and the character of their relations with other people in Canada. As Elder Moses Smith of the Nuuchah-nulth Nation told Commissioners:

What we have – the big thing within our system...*Ha Houlthee*. That is the very basic of our political setup, is *Ha Houlthee*, which is, we might say, putting it in English, that is true sovereignty.... That is absolutely the key, the key of why we are today now, is that we have always been. That was never taken away from us.

Moses Smith  
Port Alberni, British Columbia  
20 May 1992

In their presentations to the Commission, Aboriginal people asserted consistently that their inherent rights of sovereignty and self-determination have never been extinguished or surrendered but continue to this day. They said this fact must be recognized and affirmed by Canadian governments as a basic precondition for any negotiations on self-government.

## 1.2 Traditions of Governance

In most Aboriginal nations, political life has always been closely connected with the family, the land and a strong sense of spirituality. In speaking to the Commission of their governance traditions, many Aboriginal people emphasized the integrated nature of the spiritual, familial, economic and political spheres. While some Canadians tend to see government as remote, divorced from the people and everyday life, Aboriginal people generally view government in a more holistic way, as inseparable from the totality of communal practices that make up a way of life.

This outlook is reflected in Aboriginal languages that express the concept of government in words meaning 'our way of life' or 'our life':

If you take the word *bemodezewan*, you will find that it is a way of life...That is why it is difficult when you ask an Indian person to describe self-government. How do you describe a way of life and its total inclusion of religious rights, social rights, government rights, justice rights and the use of the family as a system by which we live?...We are not prepared at this time to separate those things. They are a way of life for our people.

Leonard Nelson  
Roseau River, Manitoba  
8 December 1992

Most Aboriginal people continue to be guided, to some degree, by traditional outlooks in their approach to matters of governance. In some instances, Aboriginal communities have made traditional laws, practices and modes of leadership the basis of their contemporary governmental institutions. In other cases, however, traditional systems of governance have fallen into disuse or been replaced by new systems, such as those imposed by the *Indian Act*.

Faced with these changes, many Aboriginal people have called for a revitalization of traditional values and practices and their reintegration into institutions of government. Aboriginal people see this process occurring in a variety of ways. A number of representations made to the Commission emphasized the need to root contemporary governmental initiatives in traditional attitudes and institutions:

If self-government is to become the vehicle by which Native people resume their rightful place in North American society, it must grow, unaffected, out of a strong knowledge of the past. Only in this way,



is it assured that the Anishinabek, and other traditional governing structures, will be resuscitated for future growth and development....Knowledge of pre-contact Native societies will serve as the proper base upon which we can carefully and slowly construct models of governance. These models will be founded in the past and developed to consider environmental changes and the realities of today.<sup>17</sup>

Nevertheless, in calling for governmental structures that are grounded in Aboriginal peoples' cultures and values, some interveners also spoke of the need to adopt certain features of mainstream Canadian governments.

The Lheit-Lit'en solution was to recognize what had been lost, which is a traditional form of government..What had been lost was culture. What had been lost was any relationship between the community, the children, the adults and the elders as well as language. And that needed to be regained, the community decided.

But at the same time, the community also felt that since we live in a contemporary non-Aboriginal world that it would be impossible to regain that out of context....As a consequence, the Lheit-Lit'en decided to combine traditional and contemporary methods of governments, contemporary as well as traditional methods of justice.

Erling Christensen  
Prince George, British Columbia  
1 June 1993

In what follows, we consider some important aspects of Aboriginal traditions of governance, drawing on testimony in the Commission's hearings, briefs and studies. These aspects are

- the centrality of the land
- individual autonomy and responsibility
- the rule of law
- the role of women
- the role of elders
- the role of the family and clan
- leadership
- consensus in decision making
- the restoration of traditional institutions.

There is no uniform Aboriginal outlook on these topics, many of which are the focus of lively discussion and exchange among Aboriginal people. Nevertheless, the very fact that they are the object of such interest shows their continuing importance in the panoply of indigenous approaches to governance.

One point needs to be emphasized. For most Aboriginal people, 'tradition' does not consist of static practices and institutions that existed in the distant past.

It is an evolving body of ways of life that adapts to changing situations and readily integrates new attitudes and practices. As a study of traditional Inuit governance explains:

This...Inuit approach to 'traditions' and the 'traditional culture' moves 'traditional culture' away from its exoticized state depicted in books and displayed in museums and presents it instead in the everyday actions of northern individuals. This insider view grounds 'traditional culture' not in a time frame (the pre-contact period) but instead in a set of practices engaged in by Inuit of both the recent or distant past.<sup>18</sup>

Here, Aboriginal people are no more prisoners of the past than other Canadians are. They do not need to replicate the customs of bygone ages to stay in touch with their traditions, just as Parliament does not need to observe all the practices of eighteenth-century Westminster in order to honour the parliamentary tradition. Aboriginal people, like other contemporary people, are constantly reworking their institutions to cope with new circumstances and demands. In doing so, they freely borrow and adapt cultural traits that they find useful and appealing. It is not the heedless reproduction of outmoded practices that makes a vigorous tradition, but a strong connection with the living past.

### The centrality of the land

Among many Aboriginal people, 'the land' is understood to encompass not only the earth, but also lakes, rivers, streams and seas; the air, sky, sun, moon, planets and stars; and the full range of living and non-living entities that inhabit nature. In this all-encompassing view, the land is the source and sustainer of life. In return, people must act as stewards and caretakers of the earth.

The Mi'kmaq people and other First Nations believe that this land existed before man's short stay on earth and it will exist long after we have gone; therefore, it is something to be respected as it is a gift from the Creator for us to use. As a Mi'kmaq, I believe that our ancestral territory is our home. This is where our people lived and hunted. This is where our Mother Earth is consecrated with the bodies of our ancestors.

John Joe Sark  
Kep'tin, Micmac Grand Council  
Charlottetown, Prince Edward Island, 5 May 1992

Our responsibilities to Mother Earth are the foundation of our spirituality, culture and traditions.

Chief Harold Turner  
Swampy Cree Tribal Council  
The Pas, Manitoba, 20 May 1992

This philosophical approach to governance, based on respect for the land and the need for responsible action, differs from conceptions of governance that emphasize domination and control. According to the Aboriginal approach, people do not have dominion over the land; they are subject to the land's dominion.

The whole underlying concept behind the Anishinabek view of resources was based on man's role within the environment. Man was equal to the earth and played a role that would benefit his surroundings. Man was not to dominate the environment and attempt to control it at his will, but cherish it and respect it for the gifts it had to contribute.<sup>19</sup>

The importance of the land in shaping the values and codes of Aboriginal people is noted in a Commission study of Dene living in the Treaty 11 area:

According to our beliefs, the spirit and the land are the boss of Dene life. At the time Treaty 11 was signed Dene culture was still intact in its social, political, and spiritual manifestations. Our leaders of the day were bound by the social norms, the beliefs and customs of a culture which spanned more than ten thousand years.

The land is the boss. She provides all the necessities of life. The Dene are given the responsibility to continue to live with her in that part of her being which has generated the Dene way of life, to govern themselves at personal, family, regional and national levels in a manner which honours and respects her. This is fundamental to survival. To disrespect the spirit of the land is to disrespect life.

In the traditions of the Dene elders, because The Land is the boss and will teach whoever She wants, they will accept as Dene anyone who comes to know and live as they know and live. At that time they will be only too eager to share their responsibility for jurisdiction and governance. This is not a note on racial relationships, it is a statement to the belief of the Dene that The Land is the boss of culture, that culture is inextricably tied to The Land, and that people are required to adapt their way of life to the teachings of the Land.<sup>20</sup>

Over the past several centuries, Aboriginal relationships with the land have been altered fundamentally by historical processes that have distorted and in some cases severed these relationships. Some Aboriginal people have been left with virtually no recognized land base of their own. Even where an exclusive land base exists, it is often very small, a mere fraction of the people's traditional territories. Moreover, Aboriginal people frequently have only limited access to their traditional territories and little or no priority when use of those lands and resources is allocated. They have little say in decisions concerning the development of those territories and derive little benefit from such development. All

these circumstances have profoundly affected the collective lives and welfare of the people concerned.

### Individual autonomy and responsibility

In most Aboriginal societies, an individual is imbued with a strong sense of personal autonomy and an equally strong sense of responsibility to the community. Since the welfare of the community depends on the ingenuity, initiative and self-reliance of its individual members, individual rights and responsibilities are viewed as serving rather than opposing collective interests.

One of the most important and respected attributes of a person in Inuit society is their degree of independence and ability to meet life challenges with innovation, resourcefulness and perseverance. Traditionally, these were traits that would greatly increase the chance of survival for the individual and group....In addition to a strong value being placed on individual independence, the practice of sharing was held to be of the utmost importance.<sup>21</sup>

In general, the Dene governed themselves with recognition and acceptance of the individual's right and responsibility to live according to the demands and needs of the gifts which the individual carried....It is in the context of mutual benefit to all individuals concerned that collective rights and responsibilities are exercised.<sup>22</sup>

Understanding the individual's status and role has important implications for governance. In a number of Aboriginal societies, this understanding has fostered a strong spirit of egalitarianism in communal life. As the Deh Cho Tribal Council affirms, "No one can decide for another person. Everyone is involved in the discussion and...the decision [is] made by everyone."<sup>23</sup>

From this perspective, interfering with the fulfilment of an individual's responsibilities can be seen as interfering with natural law. It is only when the actions of individuals threaten the balance of society and the fulfilment of collective responsibilities that justice, as a mechanism of government, is brought to bear:

Justice was prescribed as a code of individual duties and responsibilities first; then when the correction of a wrong was ignored, the community could and would institute sanctions – ranging from restitution by apology, retribution, to outright ostracism. But always the rehabilitation and healing of the individual was central to the wellness and normal functioning of the community within the nation.<sup>24</sup>

### The rule of law

In Aboriginal societies, as in mainstream Canadian society, the rule of law is accepted as a fundamental guiding principle. However, the law is not understood



in an exclusively secular sense. For many Aboriginal people, the law is grounded in instructions from the Creator or, alternatively, a body of basic principles embedded in the natural order. Thus basic law is viewed as the 'law of God' or 'natural law'. This basic law gives direction to individuals in fulfilling their responsibilities as stewards of the earth and, by extension, other human beings. The law tells people how to conduct themselves in their relations with one another and with the rest of creation.

The Creator gave us our instructions in which are ordained our duties and freedoms; our roles and responsibilities; our customs and traditions; our languages; our place on Mother Earth within which we are to enjoy peace, security, and prosperity. These are the spiritual ways by which we live.<sup>25</sup>

Included in the spiritual laws were the laws of the land. These were developed through the sacred traditions of each tribe of red nations by the guidance of the spirit world. We each had our sacred traditions of how to look after and use medicines from the plant, winged and animal kingdoms. The law of use is sacred to traditional people today.

Dennis Thorne  
Edmonton, Alberta  
11 June 1992

Since the law ultimately stems from God, any failure to live by the law is to turn one's back on the Creator's gifts, to abdicate responsibility and to deny a way of life. The law helps people fulfil their responsibilities as individuals and members of the community.

The traditional laws of most Aboriginal peoples are customary and usually unwritten. They are embodied in maxims, oral traditions and daily observances and are transmitted from generation to generation through precept and example. This practice is often misunderstood. Some outside observers, accustomed to thinking of the law as rules laid down by legislatures and embodied in written statutes, have denied that custom truly can constitute law. They forget that, even in mainstream society, few individuals are familiar with more than a small portion of the written law; in practice, ordinary people conduct their lives in accordance with what amounts to a living customary system. Moreover, English common law, which is the basis of the legal system in Canada outside Quebec, originated as a body of customary law under the supervision of the courts. To this day, it is largely uncoded.

The *Kaianerekowa*, or Great Law of Peace, of the Haudenosaunee Confederacy is perhaps the most frequently cited example of traditional Aboriginal law. While versions of the *Kaianerekowa* have been reduced to written form, the Haudenosaunee maintain that it is essentially a law based on the mind and can be discerned only through oral teachings.

Five centuries ago and today, Haudenosaunee law was and is based on peace. The lawmakers, in weighing any decision, must consider its effects on peace. It is a law based on rational thought, on using the mind both for the good and to its fullest potential. The lawmakers, in weighing any decision, must cast their minds seven generations ahead, to consider its effects on the coming faces. The lawmakers must consider the effects of each decision on the natural world.<sup>26</sup>

From the time they emerged as a new nation on the plains of western Canada, the Métis people had their own customary rules of behaviour. During the 1870s, these rules were partially codified in the *Laws of St. Laurent*, as described by the Métis National Council:

In establishing a permanent settlement in the South Saskatchewan Valley, the Métis updated and formalized the old laws of the prairies into what came to be known as the *Laws of St. Laurent*. These written laws were adopted during the Assemblies of 1873 to 1875 in the absence of any other government presence in that area. They set out the civil rule for the life of the community including twenty-five Articles concerning the *Laws of the Prairie and Hunting*.<sup>27</sup>

This code contained provisions governing the proceedings of the council and the daily life of the community. For example, Article 16 provided that any contract made without witnesses was null and void and would not be enforced by the council. This rule was qualified by a further article stating that any contract written in French, English or Indian characters would be valid, even if made without witnesses, if the plaintiff testified on oath as to the correctness of contract. A further glimpse into communal life is furnished by Article 21, which provided that any young man who, under pretext of marriage, dishonoured a young girl and later refused to marry her would be liable to pay a fine of fifteen Louis; the article added: "this law applies equally to the case of married men dishonouring girls."<sup>28</sup>

Inuit society provides another example of how customary law was successful in regulating individual behaviour and resolving disputes within the community. Although Inuit law was unwritten, it nevertheless constituted a strict code of personal conduct that was understood by all members of the society. People who departed from this code could expect to face a range of sanctions from other members of the community. These sanctions were usually sufficient to bring offenders into line and restore balance within the community. In this manner, Inuit communities were able to maintain a relatively peaceful and stable existence as self-governing units.

Inuit society governed the behaviour of its members with a complex system of values, beliefs and taboos that clearly outlined the expectations of how people should behave. These rules were retained and

passed on by the elders through oral traditions as well as by example to the children.<sup>29</sup>

Some Aboriginal people, with the help of their elders, have remained in close touch with their traditional legal systems. These systems are not static but continue to evolve and provide a strong basis for contemporary communal life. Other communities have not been as fortunate and are only just beginning to rediscover and revitalize their traditional laws. They recognize that the process may not be easy and will require time, sustained effort and the commitment of scarce resources. Nevertheless, they are hopeful they will succeed.

Our traditional laws are not dead. They are bruised and battered but alive within the hearts and minds of the indigenous peoples across our lands. Our elders hold these laws within their hearts for us. We have only to reach out and live the laws. We do not need the sanction of the non-indigenous world to implement our laws. These laws are given to us by the Creator to use. We are going to begin by using them as they were intended. It is our obligation to the children yet unborn.

Sharon Venne

Saulteau First Nation

Fort St. John, British Columbia, 20 November 1992

## The role of women

In many Aboriginal societies, women's roles were significantly different from those of men in governance and politics as in other areas of life. This was the subject of widely varying interpretations and comments among interveners. In some cases, views reflected differences in personal experience and circumstances, but in others they represented conflicting evaluations of similar experiences. We will give only a brief sampling of these views in this chapter. More detailed discussion of the subject can be found in Volume 4, Chapter 2.

Some interveners maintained that traditional differences in roles did not necessarily mean a lack of respect for women. In some societies, they said, the roles of women, while distinctive, were broadly equivalent in importance to those of men. For example, the importance of the family in political organization ensured that women were often involved in decision making, even if normally they did not act as public spokespersons or play a prominent role in political life beyond the family.

One version of this view is presented in the brief of the Stó:lo Tribal Council:

Broadly speaking, Stó:lo women did not have complete social and political equality with men. This does not mean women did not hold positions of power or achieve high social rank, but rather that their roles were different, and the power and authority at their disposal was exercised in different ways. For instance, much has been said con-

cerning the fact that only male heads of households were permitted to speak at official public gatherings. However, it was universally recognized that a family leader spoke on behalf of his entire family, and therefore everything he said had theoretically been approved previously by the family.

It was at family gatherings of family members that women's opinions were strongly expressed. Indeed, current Elders point out that while the formal interfamily gatherings (where only men could speak) have fallen into disuse, informal family meetings have not, and that more often than not, families today continue to be controlled, in large part, by powerful matriarchs who exercise their considerable power behind the scenes.<sup>30</sup>

Others pointed out that certain Aboriginal societies are matrilineal; the female line is used to determine membership in the kinship group and to trace the descent of names and property rights. In these societies, it was said, women often had primary responsibility for the appointment and removal of leaders. Such roles were extensions of women's responsibility to ensure that peace and balance were maintained within the community and the nation.

[Although] men were usually in the official leading role as chiefs, diplomats and negotiators, these men were frequently selected and dismissed by a woman (or women) of the tribe.<sup>31</sup>

However, such viewpoints were not universally shared. Other commentators held that in many cases women did not traditionally enjoy governmental power equivalent in importance to that of men, even if government is understood in a broad way as incorporating the familial, social and spiritual spheres. For example, a study of governance traditions in an Inuit community presents a more varied picture:

As the testimonies demonstrate, at times, elders or even younger participants, when looking to the past, remember scenarios that they experienced or which were recounted to them in which women seemed to have been empowered – times for example when they provided clothing and care for their families or acted as midwives out on the land. Those same participants may in the same interview remember other times when, as women, they were powerless and victimized, such as when they were forced into arranged marriages or made to obey their husbands and their in-laws. These opposing testimonies attest to this view of power as a subjective state; their contradictory nature reflects a temporal approach to women's power.<sup>32</sup>

The same study also found that, notwithstanding the settlement process of the 1950s and 1960s, which put women's roles in a state of flux, Inuit women feel



that they are more empowered today and have a larger say in the political affairs of their communities. This is in part the product of their active participation in the numerous councils and committees that are a standard feature of contemporary political life in the North.

Almost all of the testimonies attest to the fact that women in Pond Inlet today have a voice that was denied them in traditional culture....Women describe a new political power available to them through their participation on committees and councils and with the development of Nunavut.<sup>33</sup>

According to these views, the advent of modern, electoral-style governmental systems has in some instances provided greater scope for women to participate actively in communal decision making. Nevertheless, others felt that modernization has sometimes had the opposite effect. For example, some First Nations interveners maintained that the disempowerment of women in their communities is largely a product of the *Indian Act* and other colonial impositions, which introduced alien and unsuitable forms of government.

Presently the women in our communities are suffering from dictatorship government that has been imposed on us by the *Indian Act*. We are oppressed in our communities. Our women have no voice, nowhere to go for appeal processes. If we are being discriminated against within our community or when we are being abused in our communities, where do the women go?

Joyce Courchene  
Indigenous Women's Collective  
Winnipeg, Manitoba, 3 June 1993

The existing system is one that was imposed upon our societies as a way of destroying the existing political system, and as a way of controlling our people. Contrary to our traditional systems, the *Indian Act* system provides a political voice only to the elected chiefs and councillors normally resident on reserves, and usually male. The *Indian Act* system silences the voice of elders, women, youth and off-reserve citizens of First Nations.

Marilyn Fontaine  
Aboriginal Women's Unity Coalition  
Winnipeg, Manitoba, 23 April 1992

There were differing views on how this situation might be remedied. Not everyone agreed that self-government would be a sufficient cure for the sense of powerlessness experienced by some Aboriginal women. Some even expressed the fear that certain forms of self-government are in reality male-dominated processes that will contribute further to the marginalization of women.

Many women do not trust their leadership, indicating people like the idea of self-government but do not trust those who would run the government or dislike the present provisions on self-government as set out by the federal government. As one woman said: "I don't believe in the type of self-government that is being developed by the political leaders. Self-government comes from the people. It's up to us to go back to our traditional ways, no one can give us our power."

Unidentified intervener  
Saskatoon, Saskatchewan  
13 May 1993

Others warned of the dangers of fundamentalist approaches to self-government, which treat traditions as sacrosanct and fail to scrutinize them adequately in the light of present-day realities and values. Certain traditional practices, they argued, may have oppressive aspects that need to be recognized for what they are. Such practices should not be resurrected simply in the name of tradition without assessing their potential effects in the modern context.

Tradition is invoked by most politicians in defence of certain choices. Women must always ask – whose tradition? Is 'tradition' beyond critique? How often is tradition cited to advance or deny our women's positions?...Some Aboriginal men put forward the proposition that a return to traditional government would remedy the abusive and inequitable conditions of women's lives. We have no reason to put our trust in a return to 'tradition', especially tradition defined, structured and implemented by the same men who now routinely marginalize and victimize us for political activism.<sup>34</sup>

Many others pointed out the need for a rekindling of traditional values and ways before genuine self-government could be realized. They suggested that it was imperative for people to return to their own customs, languages and healing processes.

We believe that true Aboriginal government must reflect the values which our pre-contact governments were based upon. We point out that, according to traditional teachings, the lodge is divided equally between women and men, and that every member has equal if different rights and responsibilities within the lodge....The structure and functions of the traditional lodge provide a model for the exercise of self-government.

Marilyn Fontaine  
Aboriginal Women's Unity Coalition  
Winnipeg, Manitoba, 23 April 1992

Before we can achieve self-government our communities and nations need to be revitalized and our people have to be given an opportunity to grow and develop healthy lifestyles.<sup>35</sup>

These varying viewpoints present troubling and difficult issues, which we discuss in greater detail elsewhere in this report.

## The role of elders

Elders have traditionally held special roles and responsibilities in matters of governance, stemming from their positions as esteemed members of the family and the larger community. Elders are teachers and the keepers of a nation's language, culture, tradition and laws; they are the trusted repositories of learning on history, medicine and spiritual matters. Their roles include making decisions on certain important matters, providing advice, vision and leadership, and resolving disputes within the community (see Volume 4, Chapter 3).

In some traditional forms of government, councils of elders were the primary decision-making bodies.

The oldest members of each clan...were the ones who formed what we called the Council of Elders. They came together to sit in Council, the oldest members of each clan. They were the ones who made decisions.

The only type of hierarchy that we did have was what we could call a natural hierarchy. Because they have learned all the skills of their clan through their long life, that earned them the right to sit in Council and be part of the decision making.

Chief Jeannie Naponse  
Whitefish Lake

Toronto, Ontario, 18 November 1993

With the arrival of new systems of government and services, the roles and responsibilities of elders have often suffered, not only in the area of communal decision making but also in areas such as health and justice. For example, a study of Inuit decision making suggests that many factors helped to disenfranchise elders and segregate them from the mainstream of Inuit society. These factors include a decline in the importance of the extended family, the suspension of many traditional sharing practices, the erosion of the obligation to provide for one's kin, and the mixing of populations. This process has gone so far that elders have now formed their own interest groups, a trend that has been reinforced by governmental authorities in creating special elders committees, conferences and centres.

In our effort to expand the role of elders in society...we must be careful not to isolate elders gratuitously from the mainstream or emphasize their roles to the extent that their relationships to their *ilagiit* [kin

group] are undermined or jeopardized. Rather, we must first endeavour to promote traditional extended family values, decision-making structures, authority relationships, etc. at the grassroots level, where these features are given value and meaning.<sup>36</sup>

In some contexts, elders have been able to maintain some of their traditional roles and responsibilities despite changes in the formal structures of communal decision making.

Elders continue to play a major role in maintaining harmony and peace within the community. Many problems and disputes are resolved through the mediation of elders. Thus, the key role of elders in traditional community governance continues to partially survive in many nations.<sup>37</sup>

An example is furnished by the operations of the mental health committee in Pangnirtung, Baffin Island. This committee helps people heal emotional wounds related to sexual abuse, chronic depression, suicide of friends and relatives, and other matters. People are often referred to the committee by the local health centre or the Royal Canadian Mounted Police. In other cases, they go voluntarily or on the advice of family and friends. The committee is made up of 10 members, mostly volunteers and mostly women. The proceedings are informal; the usual procedure is to discuss the problem until all participants have had their say and then to reach consensus on how the matter should be resolved. Decisions are never taken without consulting elders, at least two of whom are present at each meeting. Elders are also available for consultation at any time, as the need arises. It is said that the advice of the elders invariably carries the most weight and forms the basis of most committee recommendations.<sup>38</sup>

Some Aboriginal people have taken formal steps to restore elders to positions of responsibility. For example, in 1992 the Lheit Lit'en Nation moved to reinstate its elders council as the centre of its structure of governance. The elders council is now responsible for choosing the traditional chief and sub-chiefs of the nation, in accordance with its traditions and culture.<sup>39</sup> However, some interveners stated that contemporary efforts to ensure a greater role for elders in governance have not always brought an increase in genuine authority or respect. They maintained that such arrangements often constitute mere lip-service to the idea of involving elders in mediation and consensus-building procedures.

Beneath the surface appearance of these arrangements there may be very little genuine respect paid to elders and their advice. Often, although formally recognizing and respecting the leadership of elders, the elected politicians seem to regard elders and traditional government structures as threats to their authority.<sup>40</sup>



## The role of the family and clan

Traditionally, the family or clan constituted the basic unit of governance for many Aboriginal peoples. For more detailed discussion, see Volume 3, Chapter 2.

Before the white nations had any dealings with the Indian people of this nation, the whole realm of Indian being Indian meant that we had a clan system. It's a system of relationships that are defined by our birth right.

The clan system is a social order. The clan system is a justice system. The clan system is a government. The clan system is an extended family unit.

Leonard Nelson  
Roseau River, Manitoba  
8 December 1992

It is my personal view that the culture of any people is centred and perpetuated through the family unit. It is for this reason that I do not believe one can legislate the perpetuation of cultural values. I believe that if you destroy the family unit you will also lose the culture of a people. In this regard, I cannot overstate the importance of recognizing the integrity of the family unit as an integral part of any initiative leading toward Aboriginal self-government.

Dennis Surrendi  
Elizabeth, Alberta  
16 June 1993

Families and clans fulfilled a number of essential governmental functions. They determined who belonged to the group, provided for the needs of members, regulated internal relations, dealt with offenders and regulated use of lands and resources. They also imbued individuals with a sense of basic identity and guided them in cultivating their special gifts and fulfilling their responsibilities.

The clan system gives each member of the community clear knowledge of his or her place, in a number of ways. In a community with a functioning clan system, it tells individuals who their spiritual and political leaders are. It tells the person where to sit in the ceremonies. It often tells people about the others to whom they bear a special set of obligations – to help and guide them, but also that they are responsible and accountable to a particular individual as well as to all members of the clan.<sup>41</sup>

There was, of course, a great deal of variation across Aboriginal nations in the precise roles played by families, clans and kinship groups. In many Aboriginal societies, the family or extended family was the major self-governing unit. It was

responsible for regulating internal social and economic activities, and it provided for the needs of individuals and the security of family members. This situation is exemplified by Inuit, prior to their settlement in permanent communities in the 1950s and 1960s, and also by some groups among them that continue to practise a semi-nomadic lifestyle at certain times of the year.

The family is the foundation of Inuit culture, society and economy. All our social and economic structures, customary laws, traditions and actions have tried to recognize and affirm the strength of the Inuit family unit.

Henoch Obed  
Labrador Inuit Alcohol and Drug Abuse Program  
Nain, Newfoundland and Labrador  
30 November 1992

Until 40 years ago, most Inuit lived amongst their families and extended families in small camps. Hunting and fishing provided food for the family and furs were exchanged for tea and other goods. Each member of the family had their own roles to fill in camp life....Because life was based on the family and family needs, community or camp problems were solved within family units; there was little need for such southern methods of problem solving as boards or committees.<sup>42</sup>

Other peoples, such as the members of the Haudenosaunee Confederacy and the nations of the northwest coast, have traditionally lived in relatively permanent communities. Here clans often play a central role in governance. The clan system identifies who belongs to the group and in some cases determines the particular responsibilities and rights of both individuals and the clan itself. As the basic units of political organization, families and clans participate in the broader political and social relations of the community, the nation and, in some cases, the confederacy.

There are also great variations among Aboriginal nations in how family and clan systems affected the roles and opportunities of individuals. In some nations, clan structures were fairly rigid and confined individuals to the social positions and roles they were born into or inherited. In other nations, such as the Stó:lo, the structures were more flexible and permitted individuals to move from one position or role to another, depending on the degree of respect they were able to command.

Traditional Stó:lo society was centred around the extended family unit, and broken into well defined stratas which they defined as "Chiefs, notables and base folk"...Stó:lo extended families were characterized by distinct, but fluid, levels of stratification. Each nuclear

family within the extended family structure, and each individual within the various nuclear families, was ranked....Among the Stó:lo high rank could not be inherited, rather it had to be earned.<sup>43</sup>

Finally, social specialization played a larger role in some clan systems than in others. Among certain peoples, such as the Anishnabe, particular clans had distinctive functions that they alone could fulfil:

Our structure was based on the five clans....The five clans actually addressed five functions in a community. In any community there is a need for leadership, for someone to take on that responsibility. There is also the need for protection in any community. There is also the need for sustenance, and there is also the need for learning and medicine....When children were born into a clan, if they were part of the Medicine Clan, then all the skills and knowledge related to that clan would be passed on to that child. By the time the child reached adult age, they would know the skills of their clan. They would know their responsibility to the community, and that was their function.

Chief Jeannie Naponse  
Whitefish Lake

Toronto, Ontario, 18 November 1993

Among other peoples, such as the Gitksan and Wet'suwet'en, each house (a smaller family grouping within the clan) fulfilled similar functions in government, with limited specialization of functions across clans within the nation.

## Leadership

In many Aboriginal societies, political power was structured by familial relationships and tempered by principles of individual autonomy and responsibility. As described in one brief, leaders were viewed as servants of the people and were expected to uphold the values inherent in the community. Accountability was not simply a goal or aim of the system, it was embedded in the very make-up of the system.<sup>44</sup>

Within families, clans and nations, positions of leadership could be earned, learned or inherited. Frequently, these methods operated in conjunction.

The selection of Chief was hereditary through a patriarchal line; the first born descendant would not automatically enter this position, it had to be earned. From a very young age the candidate for leadership would be trained and advised by his peers to ensure that he would be ready to assume his role....The selection of leadership was a process that required much time and devotion. To become a leader was a great honour. The role of Chief was not one of power, rather it was a responsibility to fulfil the needs of the people.<sup>45</sup>

In many instances, elders were viewed as community leaders. They sat in their own councils, which were frequently composed of both men and women. Decisions made by the elders council were expected to be observed and implemented by other leaders in the community.

In some First Nations, leadership functions were dispersed among the holders of various positions:

We do not follow the present day concept of chief and band council that was created by Indian Affairs. We have a traditional spiritual chief who is a medicine man; also we have four thinkers whose responsibility is for the welfare of the clan and to look into the future. Then we have our Tukalas whose responsibilities are for the protection and security of the clan.

Dennis Thorne  
Edmonton, Alberta  
11 June 1992

In other cases, leaders were expected to take on a variety of roles and had to possess a wide range of personal qualities. For example, a study of leadership among Dene identifies the functions of spokesperson, adviser, economic leader (as hunter and trapper), spiritual adviser, prophet and role model. Qualities associated with these functions include oratorical skill, wisdom, authority, economic proficiency, generosity, spiritual insight and respect.<sup>46</sup>

Among certain Aboriginal people, one clan was vested with responsibility for leadership and its members were expected to cultivate the relevant skills.

If one was born into the Leadership Clan, then there would be the gift of speech, to be able to have the power to influence by using language. Again, they learned all those skills as they were growing up, and also to have a good understanding of what leadership meant in those days.

Chief Jeannie Naponse  
Whitefish Lake  
Toronto, Ontario, 18 November 1993

In other instances, clan mothers had the responsibility of choosing leaders from among the members of families holding leadership titles. The clan mothers also had the power to remove leaders who were derelict in the performance of their duties.<sup>47</sup> In such societies, children were identified as potential leaders by the women of the clan.

Within the Haudenosaunee Confederacy, positions of leadership were specialized. Each clan within the nation was represented at the Council of the Confederacy by *rotiianeson*, or hereditary chiefs. These offices were hereditary in the sense that eligibility to fill them was inherited by the individual. Pine tree chiefs, who were not from families holding hereditary titles but earned their titles



through merit, sat with and advised the councils of their nations. War chiefs as military leaders had the responsibility of executing decisions made in council by the *rotiianeson*.<sup>48</sup>

Traditional Inuit societies exhibited a variety of patterns of leadership, as revealed in Marc Stevenson's study of traditional decision making in the Nunavut area. Among the Iglulingmiut of the Foxe Basin and north Baffin Island, the institution of leadership was well developed, with the eldest resident hunter in a band usually assuming the role of *isumataq*, the one who thinks. The authority of the *isumataq* often extended to socio-economic matters affecting the entire camp, including the sharing and distribution of game and other food. Iglulingmiut society placed great emphasis on the solidarity and hierarchical structure of the extended family, with a person's place in the hierarchy being determined by age, generation, sex and blood affiliation. The Iglulingmiut also recognized a broader tribal identity, beyond the extended family and the band.<sup>49</sup>

A second pattern of leadership is represented by the Netsilingmiut, who live on the Arctic coast west of Hudson Bay. Originally, most local Netsilingmiut groups were based on the relationship between men, ideally brothers. Although the eldest active hunter in the group was usually regarded as the leader, important decisions affecting the community were generally made jointly by several adult males. In effect, leadership took second place to the maintenance of co-operative relations among the males in the group. Male dominance and solidarity were expressed in the separation of men and women at meal times, the close bonds of affection and humour between male cousins, and the high incidence of female infanticide, which was the man's prerogative. There was little sustained co-operation among local groups and much mutual suspicion and hostility. There seems to have been no recognition of an overall tribal identity.<sup>50</sup>

Another distinctive pattern is represented by the Copper Inuit, who lived on Banks and Victoria islands and the adjacent mainland in the central Arctic. The Copper Inuit were organized around the nuclear family, whose independence was absolute in all seasons of the year, whether during the summer when people were dispersed inland or during the winter when they assembled in large groups on the sea ice. In social structure and ideology, the Copper Inuit were highly individualistic and egalitarian, and in this respect differed notably from other Inuit of the Nunavut area. As Stevenson notes:

So great was the emphasis on egalitarianism that there were no positions or statuses demarcating certain individuals as standing above or apart from others outside the nuclear family...While a man because of his ability or character might attain a position of some influence, as his powers faded, so too did his prestige and authority...Even women outside the domestic sphere enjoyed equal status with that of men in decision making.<sup>51</sup>

The emphasis on individual autonomy made communal action very difficult, and there was no common council for decision making, no recognized leader to provide direction, and no special deference to the views of elders. As a result, murders and other transgressions against society often went unpunished.

Generally, however, traditional Inuit societies recognized two types of leadership. The first type is *angajuqqaq*, a person to be listened to and obeyed, and the second is *isumataq*, one who thinks. Both types of leadership were earned. However, in the first case, leadership depended on a person having a certain position in an organized system, while in the second case leadership depended more on individual merit and the ability to attract and maintain a group of followers. Nevertheless, the distinction between the two types of leadership was not hard and fast, and most successful leaders combined the features of both. Such persons could not abuse their authority or neglect their other leadership role without risking the loss of respect and ultimately an erosion of their influence and authority.<sup>52</sup>

In speaking of their traditions of governance, many Aboriginal people emphasize that their leaders were originally chosen and supported by the entire community. This was especially true in non-hierarchical societies where leaders were equal to all others and held little authority beyond that earned through respect. In such societies, support for leaders could be withdrawn by the community as a whole or by those (such as clan mothers) with specific responsibilities in the matter.

Part of the principles under our traditional system of government was that the leader does not have a voice in his own right. He has to respect the wishes of the people. He cannot make statements that are at odds with what the people believe.

Margaret King  
Saskatoon Urban Treaty Indians  
Saskatoon, Saskatchewan, 28 October 1992

Leadership was reflective of the people's faith and confidence in that particular individual's capabilities as a Chief. If for some reason these duties as leader were not fulfilled or met satisfactorily by the people then they could "quietly withdraw support".<sup>53</sup>

Many First Nations interveners spoke of how the *Indian Act* system of government had eroded traditional systems of accountability, fostered divisions within their communities, and encouraged what amounted to popularity contests. The first past the post system, whereby the greatest number of votes elected a candidate, was seen as especially problematic. It permitted large families to gain control of the council and shut other families out of the decision-making process.

A number of First Nations, such as the Teslin Tlingit, the Lheit-Lit'en, and the Gitksan and Wet'suwet'en, have taken steps to replace leaders elected under the system imposed by the *Indian Act* with traditional leaders.

Our Clan leaders have always been alive and well and thriving in Teslin, but their duties were mainly confined to cultural activities....They were stripped of all the powers they traditionally held. They were consequently stripped of their respect.

What the constitution does is it puts the Clan leaders and the Elders in their rightful spot in Tlingit society, and that is at the top of the totem pole.

Chief David Keenan  
Teslin, Yukon  
27 May 1992

In some cases, this objective is being achieved through a return to band custom, by means of a procedure laid down in the *Indian Act*. In other instances, as with the Teslin Tlingit, traditional systems are being revived through self-government agreements. Certain communities are in a transitional period, with band councils operating side by side with traditional leaders. We return to this topic later in this chapter.

## Consensus in decision making

The art of consensus decision making is dying. We are greatly concerned that Aboriginal people are increasingly equating 'democracy' with the act of voting....[W]e are convinced that the practice of consensus decision making is essential to the culture of our peoples, as well as being the only tested and effective means of Aboriginal community self-government.<sup>54</sup>

Decision making took a variety of forms in traditional Aboriginal societies. For example, decentralized systems of government often relied on the family and its internal structures to make decisions. In such societies, the autonomy of family groups was a fundamental principle.<sup>55</sup> Societies with a more complex political organization made decisions not only at the level of the family but also through broader communal institutions. The potlatch, as practised among the peoples of the northwest coast, is an example of a communal institution serving multiple functions.

The potlatch was a gathering of people, often including people from surrounding nations. According to the Lheit-Lit'en Nation, the potlatch was usually a culmination of smaller earlier meetings where individual issues were dealt with. At this final gathering, all people

were included so that everyone could participate in final discussions and be aware of the decisions and agreement reached. The gathering dealt with territorial and justice issues and was generally the main instrument of community control, community watch, defence of territory and any issues relating to the community.<sup>56</sup>

Whatever their system of government, many Aboriginal people have spoken of the principle of consensus as a fundamental part of their traditions. Under this principle, all community members should be involved in the process of reaching agreement on matters of common interest. Among some peoples, discussions generally begin at the level of the family. In this way, the views of women, children and all who are not spokespersons may help shape the view expressed by the family or clan. Discussions may then proceed at a broader level and involve all family spokespersons, clan leaders or chiefs. In certain cases, all members of the community meet in assembly. Through a prolonged process of formulation and reformulation, consensus gradually emerges, representing a blend of individual perspectives.

In describing how an Anishnabe nation with seven clans came to decisions through a consensus-seeking process, an intervener made these observations:

Peter Ochise...said seven twice is eight....It's taken me some time to grasp what he meant. Seven perspectives blended, seven perspectives working in harmony together to truly define the problem, truly define the action that is needed makes for an eighth understanding. It's a tough lesson that we don't know all the answers, we don't know all the problems. We really own only one-seventh of the understanding of it and we only know one-seventh of what to do about it. We need each other in harmony to know how to do things....This process that we had was 100 per cent ownership of the problem.

Mark Douglas  
Orillia, Ontario  
14 May 1993

In consensus-based political systems, the concept of 'the loyal opposition', as in parliamentary systems, does not exist. As Williams and Nelson point out, decision making by consensus, often referred to as coming to one mind, is gradual, and the resolution of issues is built piece by piece, without confrontation.<sup>57</sup>

A study of Dene governance traditions notes that "consensus among the Dene is more a quality of life than a distinct process, structure or outcome."<sup>58</sup> It permeates all levels of decision making, from the extended family to local and regional communities and the nation as a whole. Nevertheless, the same study observes that certain conditions are necessary for consensus systems to operate properly. These include face-to-face contact among members and the opportu-



nity for those affected by decisions to take part in them. Consensus systems also require a broad pool of shared knowledge, including recognition of the leadership qualities of particular individuals, their family, history, spiritual training and so on. These conditions presuppose a basic political unit having strong continuing ties, such as those found in the extended family.

In many First Nations communities, the family-based consensus process has been displaced by majority-based electoral systems, which have altered the roles of women, elders and other members of the community. According to some interveners, these electoral systems have had the effect of splintering viewpoints, alienating the community from decision making, and breeding distrust of leaders and officials. Electoral systems have also been susceptible to domination by numerically powerful families in the community.

When you look at elections in communities with the DIA elected system it's common knowledge that the ones with the bigger families are the ones that get elected in these positions today.

Jeanette Castello  
Terrace, British Columbia  
25 May 1993

As the submission of the Stó:lo Tribal Council observes, if a community has only five extended families, it is relatively easy under the plurality system for one large family or interest group to dominate council and monopolize power. Indeed, it has been reported that councillors representing minority families often feel so politically redundant that they stop attending meetings. For some interveners, such a system lacks legitimacy:

To the Stó:lo Elders, it is intellectually inconceivable that any government can be viewed as legitimate when a leader can be chosen, for example, from a list of three candidates and be declared winner despite up to 66% of the people voting against him.<sup>59</sup>

Numerous First Nations interveners called for their governments to revive traditional methods of decision making that incorporate broader and more balanced systems of accountability. In their view, to gain legitimacy and credibility, First Nations governments and leaders must reflect the entire group they represent. Decision-making processes must be accessible and responsive to the views of communities, families and individuals.

The leadership must pursue a course of increased accountability to the people. This begins with returning authority and responsibility to the community. It means opening the lines of communication and providing a network of dialogue. This dialogue will be fundamental in building the bridge between the leaders and the Anishinabek people.<sup>60</sup>

## The restoration of traditional institutions

Many Aboriginal people see revitalization of their traditions of governance as playing an important role in reform of current governmental systems. The Assembly of First Nations states:

The move to re-establish and strengthen First Nation governments must be encouraged by all levels of government. The establishment of First Nation governments based on First Nation traditions, including hereditary systems, clan systems and other governing structures, should be encouraged and innovative institutions developed to reflect both these traditions and contemporary governing needs.<sup>61</sup>

For some groups, a return to traditional systems of government would mean the restoration of the primary role played by extended families and clans.<sup>62</sup> For example, the extended family might be given initial responsibility for matters affecting the welfare of individuals and the family, such as domestic conflict, child welfare and some aspects of the administration of justice, such as the healing of offenders. Representatives of families or clans might come together as a community council, which would exercise a range of governmental functions and responsibilities. Chiefs or chief spokespersons would then be selected in a traditional manner, which in some cases might involve mutual agreement among families. Such arrangements would be designed to avoid the situation that sometimes results under conventional electoral arrangements, whereby one or two families in a community are able to dominate the entire apparatus of government.

In some approaches, special roles and responsibilities should be assigned to women and elders in a revival of traditional institutions. Such approaches would place women and elders at the centre of government and decision making and give them particular responsibilities for the selection and removal of leaders. Other approaches would assign women and elders mainly advisory and supportive roles. Approaches of the latter kind are cause for scepticism and concern for many Aboriginal women, who express the fear that such arrangements may disenfranchise them or muffle their voices under a blanket of tradition.<sup>63</sup>

Such concerns are not confined to women. Several men have expressed the view that any revival of traditional institutions and laws need not (and should not) involve reinstating practices that discriminate against certain individuals and groups.

I think a lot of the traditional laws and traditional concepts make a lot of sense and that is how our society functioned in the past and it can function again very well, but in doing so we have to be careful that we do not take away rights from people and that individual rights and collective rights are properly addressed and that traditional

laws are clearly defined and apply to everybody, not only to certain groups and not to other groups.

Chief Jean-Guy Whiteduck  
Maniwaki, Quebec  
2 December 1992

The Teslin Tlingit Nation in the Yukon is an example of a group that has taken significant steps toward restoring its traditional system of government, particularly in the areas of leadership and decision making.<sup>64</sup> It has done so as part of a self-government initiative that is parallel to its negotiation of a comprehensive land claims settlement. The new arrangements are embodied in a written constitution developed pursuant to the self-government agreement. The constitution represents an adapted version of traditions that have been observed from time immemorial. It envisages a multi-level governmental structure, with institutions both at the clan level and at the level of the nation as a whole.

The five clans of the nation play an important role in the new arrangements. They determine who is a member, select leaders and assume certain governmental responsibilities for the internal affairs of the clan. For example, each clan has its own court structure called a peacemaker court. At the level of the nation, there are several distinct branches of government, including an executive council, an elders council, a justice council and a general council, which acts as the main legislative body. While these councils are not exact duplicates of traditional Tlingit institutions, they reflect the nation's clan-based structure and strike a balance among the various sectors of the community. Thus, each clan is awarded five representatives on the general council. Council decisions are taken by consensus and require the presence of at least three members from each clan as a quorum. Moreover, the leader of each clan has a seat on both the executive council and the justice council.

Other Aboriginal nations envisage adopting governmental structures that combine mainstream Canadian institutions with certain traditional elements, such as decision making by consensus or clan-based selection of leaders. For example, the Nlaks'pamux Tribal Council in British Columbia has proposed a constitution that blends traditional and contemporary structures of tribal government. It features a council consisting of the hereditary chiefs of the various member tribes, 13 elected councillors and an elected head chief.<sup>65</sup> Another example is the public governments being established by Inuit in the territories and northern Quebec. While these governments will probably borrow features from Canadian models, it is also anticipated that Inuit values and perspectives will inform their structures and day-to-day operations.

Likewise, the Metis Nation of Alberta has created a senate of elders selected in recognition of their service to the nation. In addition to being custodians of Métis culture and traditions, senators are charged with presiding over ceremonies and settling certain matters, such as membership disputes. According to

a brief submitted to the Commission, a similar approach has been taken by other provincial Métis organizations and by the western Métis Nation.<sup>66</sup>

Other interveners noted that the revival of traditional institutions should not be seen as an end in itself but as a means to the larger goal of serving the contemporary needs of the community. As Chief Edmund Metatawabin of the Fort Albany First Nation stated, “While we are free to follow traditional means of collective decision making, the pragmatics of real life politics dictate that a structure must be functional in terms of today’s legal and economic reality”.<sup>67</sup>

In conclusion, many Aboriginal people are in the process of revitalizing their traditional approaches to government as part of a larger process of institutional innovation and reform. While some nations propose to establish institutions based on traditional forms, others favour approaches that use contemporary Canadian models, while drawing inspiration from traditional Aboriginal governance. Written constitutions do not tell the whole story, however. Whatever form Aboriginal governments take, they will likely be influenced by less tangible features of Aboriginal cultures. The fact that some Aboriginal governments may resemble Canadian governments in their overt structure does not preclude their being animated by Aboriginal outlooks, values and practices.

### 1.3 Visions of Governance

One of the most striking characteristics of Aboriginal people is their diversity. They speak many different languages. They have distinctive cultures and traditions. Their social, political and economic circumstances vary. A number of Aboriginal peoples have extensive land bases, others only modest tracts of land, and still others no recognized land base at all. Some have outstanding land claims, others have entered into land claims agreements. Some Aboriginal people make up the majority population in a territory or region, while others are significantly outnumbered by the general population where they live. Some enjoy relatively broad governmental powers and administer a wide range of services and programs, while others are in the process of assuming greater governmental powers. Some follow age-old pursuits and ways of life; others have embraced new and adapted ways.

This diversity is also reflected in Aboriginal people’s visions of governance. However, these visions have a common core. Ultimately, Aboriginal people want greater control over their lives. They want freedom from external interference. They do not want to be dependent on others. They want to realize their own visions of government. Aboriginal people affirm that they have the inherent right to determine their own future within Canada and to govern themselves under institutions of their own choice and design. No one can give them this right, they say, and no one can take it away.

Many Aboriginal people also feel a special relationship to the land, which they associate with their right to be self-governing. This relationship is spiritual



in its origins, but it has important practical dimensions. Lands and waters, and the varied resources that they harbour, can provide the basis for economic self-sufficiency. At the same time, these resources must be safeguarded and enhanced for the benefit of future generations. In most instances, lands and waters are central to Aboriginal visions of government.

Just as they speak with one voice on the critical importance of the land, most Aboriginal people stress the importance of their national cultures, languages and traditions. They see these as central to their collective and individual identities. However, over time, Aboriginal cultures have been subject to erosion and direct assault from governmental policies designed to assimilate Aboriginal people into an undifferentiated Canadian identity. Aboriginal peoples see self-government as one of the main vehicles for repairing the damage done to their national cultures and restoring the vitality of their languages, way of life and basic identities.

Accordingly, Aboriginal visions of self-government embrace two distinct but related goals. The first involves greater authority over a traditional territory and its inhabitants, whether this territory be exclusive to a particular Aboriginal people or shared with others. The second involves greater control over matters that affect the particular Aboriginal nation in question: its culture, identity and collective well-being.

The first goal is broadly territorial, in that it takes a definite territory and its inhabitants as the central focus. The second is broadly communal, in that it concentrates on a specific Aboriginal group and its members, wherever they happen to be located. These two goals are complementary rather than contradictory. To varying extents, many governmental arrangements envisaged by Aboriginal people aim to achieve both. Nevertheless, depending on which goal predominates, such arrangements tend to revolve around either territorial or communal forms of jurisdiction.

Territorial jurisdiction involves governmental authority over a specific territory and all its inhabitants, whether those people are Aboriginal or non-Aboriginal, the members of a single nation or many nations, permanent residents or transients. Ordinarily, this form of jurisdiction is mandatory. That is, the government has the authority (although it might choose otherwise) to pass laws that bind all individuals in the territory, even if those individuals disagree with the laws or would prefer to be exempt from the government's authority. For example, a government exercises mandatory territorial jurisdiction when it passes a law regulating the use of motor vehicles in the territory. This law applies to all individuals located in the territory – citizens, residents and visitors.

By contrast, when we speak of communal jurisdiction, we mean jurisdiction that relates exclusively to the members of an Aboriginal group living in an area with a mixed population and an existing government. In our discussion, we treat communal jurisdiction as generally voluntary rather than mandatory. That is, it depends on individuals freely identifying themselves as members of the

group in question and submitting to the authority of its governing body. In this respect, it is similar to the authority held by a religion-based school board, which depends on parents voluntarily signing up as supporters of the board.

Many concepts of Aboriginal governance centre on territorial jurisdiction. They envisage governments that exercise mandatory jurisdiction over a definite territory and all the people located there. However, there is a good deal of variation in the particular arrangements envisaged. Under some proposals, residency in the territory is limited to members of a specific Aboriginal group; under others, it is open to Canadians generally. In certain cases, the right to vote and stand for public office is available to all residents; in others, it is restricted to individuals who meet citizenship or membership requirements.

Other visions of Aboriginal governance involve a form of communal rather than territorial jurisdiction. They envisage institutions serving the particular needs of Aboriginal people who live in areas with a mixed population and an existing government. The proposals usually relate to urban and semi-urban areas and centre on the creation of special Aboriginal service agencies, cultural institutions, school boards and so forth. These institutions would exercise voluntary rather than mandatory jurisdiction and so depend on the consent of the people they serve.

These two basic forms of jurisdiction, while different, are not incompatible. As we will see, many Aboriginal visions of governance feature a mixture of territorial and communal elements. For example, some envisage governments that exercise mandatory jurisdiction over a specific territory and also a form of voluntary jurisdiction over citizens located outside that territory. Other proposals contemplate multi-level governmental structures incorporating a variety of semi-autonomous units, some exercising territorial jurisdiction, others communal jurisdiction.

We will now examine in greater detail how Aboriginal people have expressed their visions of governance. First, we will review proposals that centre on territorial jurisdiction. Then we will turn our attention to proposals for communal jurisdiction. Finally, we will consider Aboriginal perspectives on an issue that arises in both territorial and communal contexts: the most desirable level or levels for governmental functions. That is, should self-government be implemented at the level of the local community, the nation, the treaty group, the region, the province, or indeed Canada as a whole?

## **Territorial jurisdiction**

Many Aboriginal people already possess territorial bases that they govern through a variety of institutions, often established under federal or provincial statutes. For the most part, these bases fall into three categories: reserve lands, settlement lands recognized under land claims agreements, and lands set aside by a province (the case of the Métis settlements in Alberta). These territories are exclusive in the sense that they are occupied primarily by Aboriginal people and are owned by

them or held in trust for them. However, with some notable exceptions, the governmental authority that Aboriginal people actually exercise over these territories is very limited. Moreover, the territories are often small and poorly endowed with resources – inadequate to accommodate and maintain their current populations, much less future generations.

In addition to these territorial bases, many Aboriginal people also have a range of special rights and interests in larger traditional territories that they now share with others. Many Aboriginal people in this situation want more influence in the governance of these shared lands and resources. In some cases, they seek to share power with other parties through institutions involving co-jurisdiction or co-management. Such arrangements are particularly appealing to Aboriginal people when they constitute a minority in a territory and find it difficult to secure adequate representation of their interests through ordinary electoral processes. However, where Aboriginal people make up a majority of the population, other options become more attractive. For example, they might try to attain greater control over their shared traditional territories through the creation of regional or local public governments. In this way, by dint of numbers alone, they would be able to play a leading role through the operation of normal electoral processes.

Finally, some Aboriginal peoples lack any territorial base or governmental institutions. Moreover, they have little or no involvement in the exercise of authority over their shared traditional territories. Most non-status Indian and Métis people find themselves in this situation, as do certain Inuit, such as those of Labrador, and some First Nations people, such as the Mi'kmaq of Newfoundland and the Innu of Labrador.

In seeking to strengthen or restore traditional links with their territories, Aboriginal people have proposed a great variety of governmental initiatives. These initiatives fall into three groups:

- arrangements that involve a broad measure of Aboriginal authority on an exclusive territorial base, whether existing, expanded, or newly created;
- arrangements that involve a significant measure of joint jurisdiction and control over shared traditional lands and resources; and
- public governments that allow for significant Aboriginal participation in decision making.

In the following pages, we consider a selection of Aboriginal initiatives from each of these three categories.

### *Authority over exclusive territories*

There are many Aboriginal governments that currently exercise authority over exclusive territories, such as Indian reserve lands and Métis settlement lands. However, as a matter of practice, these governments exercise only delegated statutory powers, which are handed down by the federal government or a provincial





government. These powers are often very limited in scope and are subject to the paramount authority of the government that delegated them.

Aboriginal people want this situation of relative powerlessness to end. They assert the inherent right to govern their own territories within Canada and reject the notion that their powers are delegated from other governments. They claim this right to be free of undue interference from other governments in relation to an extensive range of matters. We consider section 35 of the *Constitution Act, 1982* a recognition of this right as an existing Aboriginal and treaty right (see discussion in the section on Aboriginal self-government later in this chapter).

Aboriginal people take a variety of approaches to this objective. While some groups emphasize the exclusive nature of their jurisdiction, others consider their jurisdiction shared or concurrent with other governments, at least in certain areas. Some Aboriginal groups anticipate resuming the exercise of their inherent authority in a gradual manner, beginning with high-priority areas and progressively expanding their jurisdiction in a series of planned stages. Others anticipate moving fairly swiftly to resume jurisdiction over a comprehensive range of matters. We see a blend of these approaches in the examples that follow.

The Federation of Saskatchewan Indian Nations maintains that First Nations governments possess inherent and treaty powers in the legislative, executive and judicial branches of government. It asserts that First Nations have authority over their territories and citizens in a wide range of areas. These areas include citizenship; the administration of justice; education; trade and commerce; property and civil rights; lands and resources; gaming; taxation; social development; language and culture; housing; family services and child welfare; and hunting, fishing and trapping. The federation also recognizes, however, that some aspects of these areas may be subject to the concurrent jurisdiction of other governments, particularly in relation to the activities of First Nations citizens beyond their exclusive territories. In particular, concurrency may exist in the areas of health; economic development; hunting, fishing and trapping; justice; natural resources; and property and civil rights.<sup>68</sup>

The Siksika Nation of Alberta maintains that First Nations governments constitute a unique or *sui generis* form of government in Canada.

The objective of the Siksika Nation's government initiatives is to enhance true self government. What it is attempting to structure are plenary, non delegated jurisdictions and powers that would ideally be entrenched in the Canadian Constitution. Within the context of the Canadian Constitution, the type of government envisaged entails powers and jurisdictions similar to those of a province. However, the form that such a government will take will be purely unique, as the cultural, social and political principles and values of the Siksika Nation would fine tune the exact form and mechanics of such a government....



The government that Siksika Nation desires is a true state similar to a state government in the U.S.A. That is to say, its government would have legal status and capacities on par with the province or, in some circumstances, on par with the federal government.<sup>69</sup>

Nevertheless, the Siksika Nation seems to accept the concept of shared jurisdiction with non-Aboriginal governments. For example, it anticipates that co-ordination with the provincial government will be achieved through a protocol agreement. The agreement will set out principles for negotiation in relation to priority matters, such as the management of lands and resources; the environment; traffic and transportation; public works; health and justice; and secondary matters such as education and social services. The Siksika Nation emphasizes that it possesses inherent authority in these areas. The purpose of negotiations is to establish how provincial powers will be co-ordinated with those of the Siksika government in matters of concurrent interest.

Likewise, a case study at Kahnawake differentiates areas in which power might be exercised exclusively by the Mohawk government and areas in which power might be exercised on a shared basis with non-Mohawk governments.<sup>70</sup> It notes a preference for exclusive control of areas such as lands and resources, citizenship, education, infrastructure, justice, taxation and the environment. However, there is some support for sharing power in these areas, particularly through arrangements whereby other governments would assume certain responsibilities regarding the administration and delivery of services.

Aboriginal people also expressed concern about self-government arrangements in which federal or provincial governments delegate authority and retain certain veto rights over Aboriginal constitutions, legislation and policy. A case study of the general council of the Métis settlements in Alberta notes:

The jurisdiction which considers itself the delegator often requires reassurance that the power being delegated will be exercised only in certain ways. Absent such reassurance, it will not co-operate in the scheme. The presence of a ministerial veto power over General Council policies provides this assurance, although it is universally unpopular with settlement members. To date, this has not proven to be a practical problem, since...the veto has never been exercised. However its presence is an obvious irritant, and one which the settlements will continue to attempt to have changed.<sup>71</sup>

Many First Nations communities told the Commission that their current land base is insufficient to generate the economic resources necessary for self-sufficiency under self-government.

It is foolish to pretend that self-government can be practised without a land base and resources to support the society and the administration of that society. Seventy-nine square miles will not provide

the resources needed to support the people of the communities. Our people will require more land to move forward in areas of tourism, forestry, fisheries, mining and other economic development activities in which that First Nation wishes to pursue.

Frank McKay

Windigo First Nations

Sioux Lookout, Ontario, 1 December 1992

Some First Nations communities said that outstanding land issues would need to be resolved before jurisdictional issues could be dealt with in a satisfactory manner. These communities want assurances that they will not find themselves with ample governmental powers but insufficient resources to exercise those powers effectively. As a case study of the Shubenacadie-Indian Brook First Nation noted:

All data on money, land ownership and the need for land gave support to settling land claims. It is reassuring to find that respondents believe that land is more important than money, that shared land is more important than individual ownership, that land is needed for the people to support themselves and, most important, that ownership must be settled before the band starts discussions on power and jurisdiction.<sup>72</sup>

The importance of an adequate territorial base is felt even more acutely by Aboriginal peoples without lands. For example, the New Brunswick Aboriginal Peoples' Council, which represents off-reserve people in the province, sees an exclusive land base as a prerequisite to economic self-sufficiency and cultural healing. It proposes that the province transfer unspoiled Crown land, in areas such as the Christmas Mountains in northern New Brunswick, to governments and organizations representing Aboriginal people living off-reserve. The council also calls for the right to participate in decisions regarding the management and use of provincial lands and resources generally.

The Métis Nation in the west also views territory as central to economic self-sufficiency and the protection and enhancement of Métis culture. For example, in some parts of northern British Columbia, such as Kelly Lake, Métis people have called for the province to negotiate the provision of an exclusive land base. They seek arrangements similar to the Métis settlements of Alberta, except that they would own sub-surface resources on their lands and benefit fully from their development and use.

A Metis land base is seen as essential for the long-term survival and betterment of the Metis Nation. The absence of a land and resource base is the primary source of the poverty which exists amongst our people today. Total control over our own land and resource base will generate economic development and create employment.<sup>73</sup>

These questions receive detailed discussion in Chapter 4, on lands and resources.

*Authority over shared territories*

The exclusive land bases held by Aboriginal peoples are, in most cases, only a small fraction of the much larger areas that constituted their original homelands. These traditional lands are now shared with other groups, both Aboriginal and non-Aboriginal. While Aboriginal people generally do not dispute the need to share these territories with others, they emphasize that they have strong ties to their original homelands that involve special rights and responsibilities.

Territory is a very important thing, it is the foundation of everything. Without territory, there is no autonomy, without territory, there is no home. The reserve is not our home....Before the colonization of Abitibi, our ancestors always lived on the territory; my grandfather, my grandparents and my father lived there. This is the territory that I am talking about. [translation]

Oscar Kistabish

Val d'Or, Quebec, 30 November 1992

Many Aboriginal interveners called for greater participation in the government of shared traditional territories and the management of resources located there. They seek to realize these objectives in a variety of ways. Some emphasize the need to implement or renovate existing treaties in accordance with their true spirit and intent (see Chapter 2). Others look to the settling of comprehensive land claims. Some propose regimes involving co-jurisdiction and co-management. Still others regard regional public government as an effective means to the goal.

Many treaty First Nations maintain that their treaties with the Crown were essentially concerned with the sharing rather than the surrender of their traditional lands and resources.

By treaty the Bloods agreed to share their lands with the British Crown, except for specifically reserved areas for exclusive Blood use. The treaty created a unique relationship between the Bloods and the Crown, modifying only one aspect of our rights – the right to exclusive use of the land. We retain the same legal and political status as we did when we entered the treaties. Our Elders have stated that it is inconceivable that the Bloods could have alienated themselves from the land, from their sacred obligation as caretakers of the land.

Les Healy

Lethbridge, Alberta, 25 May 1993

According to this view, the treaties not only assigned certain lands for the exclusive use of Aboriginal people, they also provided for continuing Aboriginal access to resources throughout the larger territory. In agreeing to share the land, treaty First Nations did not relinquish their jurisdiction and stewardship respon-

sibilities. It is this basic principle, based on coexistence and co-jurisdiction, that treaty First Nations wish to see implemented.

In this spirit, the Nishnawbe-Aski Nation and its member First Nations communities in northern Ontario are seeking to implement their treaty relationships with respect to shared traditional territories, covered by Treaties 5 and 9.<sup>74</sup> In a "Framework Agreement on Land, Resources and the Environment", drawn up in August 1992, the Nishnawbe-Aski Nation proposes a variety of institutions for land and resource management. Some of these would be exclusively Aboriginal in composition while others would involve sharing jurisdiction with Canada and the province of Ontario. The Nishnawbe-Aski Nation calls for prior consent by First Nations to development activities within traditional territories and the establishment of appropriate dispute-resolution mechanisms. It also envisages the application of Nishnawbe-Aski principles and values in the stewardship and use of traditional lands and resources.

Other First Nations have developed similar proposals. For example, the Montagnais of Lac St. Jean, Quebec seek to implement a land and resource management regime through partnerships with the province and other parties holding interests in Montagnais traditional territories. In the meantime, they have established an institution called Services Territoriaux, designed to protect and promote Montagnais rights and interests within their traditional territories. This institution regulates the exercise of rights by individual Montagnais members and delivers trapper assistance, safety and communications programs. It also tries to establish co-operative working relationships with other governmental authorities and users, notably by participating in regional wildlife and environmental regulatory committees. Chief Rémi Kurtness provides a brief description:

These services cover several areas of activity relating to the development of the land, management of the natural and wildlife resources, and relations with other actors in the region....To assist it in its responsibilities, the Montagnais Band Council has [developed] a process...a general code of ethics, wildlife management and harvesting activities plans, and codes of practice for each traditional activity....Some of the staff of the service, the lands officers, are responsible for applying these tools of management and regulation....All of our members, all of the Montagnais people, must follow those rules. If they do not follow those rules they are brought before the Court and we do not defend them if they do not follow the rules. On the other hand, if they are arrested and they have complied with our management plans we will defend them before the courts. [translation]

Chief Rémi Kurtness  
Band Council of the Montagnais of Lac-Saint-Jean  
Montreal, Quebec, 26 May 1993



The United Chiefs and Councils of Manitoulin has also drawn up plans to manage fish and wildlife in their traditional territories and regulate their people's activities there. These include draft regulations that set out principles to guide the use and management of resources, including safety and conservation measures, respect for fish and wildlife, and distribution and sharing among community members. The regulations establish harvesting seasons and lay down permissible methods of hunting, trapping and fishing.

One thing should be made clear at this point: we are not advocating the takeover of all fish and wildlife management, or exclusive use, in our territory. But we are asserting the right and the responsibility to regulate our own use and management of these resources in the areas where we have traditionally harvested, based on our needs. We are also prepared to challenge other governments when it appears to us that they are not managing their share of these resources responsibly. On our part there has always been a willingness to share the abundance of resources that reside in our territory, but at this stage we are not getting an equitable share, and we are not satisfied that the resources themselves are being managed properly....Eventually we can see that there will be some areas in which we have exclusive use and management responsibilities, and others where these responsibilities are shared with the Crown.<sup>75</sup>

Aboriginal peoples who lack an exclusive land base have also proposed shared jurisdiction over traditional lands and resources. An example is the proposal for a Mi'kmaq Commonwealth, which includes a plan for co-management of the fisheries.<sup>76</sup> This proposal is modelled on a New Zealand arrangement whereby the Maori are entitled to a negotiated percentage of the commercial fishery, which they manage through their own laws. It is suggested that the Mi'kmaq Commonwealth might conclude similar agreements with relevant Atlantic provinces. These agreements would determine the First Nation's share of the resource, which would then be managed by the Mi'kmaq Commonwealth through its own or contracted enforcement mechanisms.

The proposals just described share the view that Aboriginal jurisdiction over traditional territories is inherent and exists independently of any recognition by the governments of Canada and the provinces. From this perspective, agreements regarding shared lands and resources should be based on the principle of co-jurisdiction. The co-jurisdiction model differs from certain co-management approaches currently proposed by provincial governments. The latter enable Aboriginal people to participate in the management of resources, but under legislative and policy regimes developed without the participation of Aboriginal people. In the eyes of many Aboriginal people, such arrangements are unsatisfactory because they do not acknowledge the autonomous authority of Aboriginal governments regarding their

traditional lands and resources. By contrast, the type of regime favoured by many Aboriginal people would involve Aboriginal and non-Aboriginal governments exercising jurisdiction in a co-operative manner as equal parties.

### *Public governments*

In areas where the public government option is attractive, a wide range of arrangements have been proposed by Aboriginal people. Inuit in particular have long been concerned about the social, economic and political implications of being confined to exclusive land bases.<sup>77</sup> Because Inuit constitute a majority of the population in their traditional territories, they are in a position to exercise effective control over local and regional governments elected by majority rule. In these circumstances, public government allows Inuit to maintain and strengthen their relationships with their traditional lands while avoiding the risks they associate with confinement to an exclusive land base.

Plans are now being drawn up to establish a public government for the new northern territory of Nunavut.<sup>78</sup> Under recent proposals (which are still fluid) the territory will be governed by a legislative assembly elected by popular vote, with the first election held in 1999. Consideration is being given to two-member constituencies, with one woman and one man elected in each constituency. The Nunavut government will be headed by a premier and a cabinet, with cabinet members holding responsibility for specific departments. Inuktitut will be the working language of government, along with English and French. The government will be as decentralized as possible without sacrificing effectiveness. To this end, core departments may be located in the capital, with some or all of the program departments stationed in other communities. The authority of local community governments may also be enhanced. The public sector will employ Inuit in numbers commensurate with their share of the overall population, starting with at least 50 per cent Inuit representation.

Inuit of the Nunavik region in northern Quebec have proposed a regional public government featuring a legislative assembly with authority over a wide range of subjects currently within the purview of provincial and federal governments. These include lands, education, the environment, renewable and non-renewable resources, health and social services, employment and training, public works, justice, language, offshore areas and external relations.<sup>79</sup> While the government of Nunavik will be public in nature and thus open to all residents of the region, its proponents anticipate that it will reflect the distinct relationships Inuit have with their traditional lands. Under current proposals, such relationships will be protected through a Nunavik charter, which will recognize, for example, Inuit priority in harvesting wildlife, subject only to conservation needs.

Likewise, Inuvialuit of the western Arctic anticipate gradual devolution of powers from the federal or territorial government to a regional public government to be known as the Western Arctic District (or Regional) Government. The

jurisdiction of the district government would encompass such matters as culture, economic development, education, land use planning and zoning, municipal services, local parks, housing, public safety, tourism, wildlife management and taxation. It is proposed that federal and territorial laws will continue to apply until displaced by laws enacted by the district government.<sup>80</sup> Inuvialuit emphasize the need for a genuine devolution of power and authority, as opposed to a mere delegation of administrative responsibilities.

Over the years, the Labrador Inuit Association has considered various models of public government.<sup>81</sup> In 1987, the options under consideration included a regional government based on municipal units, a regional government based on federally established units, a system of issue-specific institutions, and a territorial government for northern Labrador.<sup>82</sup> In 1993, the Labrador Inuit Association submitted a proposal for a comprehensive land claims agreement that included a plan for a public form of government. However, the respective merits of public and nation-based forms of government continue to be debated.

Métis communities in the northern sectors of some provinces have also shown some interest in regionally based governments with electorates composed predominantly of Métis people. As noted in a study of Métis self-government in Saskatchewan, these governments might have authority over land and resource management, fire control, highways, health, education, justice, economic development, and other areas.<sup>83</sup>

In other cases, communities composed of both Aboriginal and non-Aboriginal people want decisions affecting the development and use of local resources to be localized. They also seek a share in the benefits derived from such activities. This situation is particularly prevalent in Labrador and other eastern coastal regions, as well as certain northern areas of the prairie provinces. Some of these communities have aspirations similar to those already described regarding authority over shared territories. Others, such as Métis people of the south coast of Labrador, aspire simply to participate in decisions affecting matters such as the conservation of fish stocks or the harvesting of renewable resources.

At present, people in these regions seldom have control over the development of their lands and resources and derive few direct benefits. Proposals have been made in some regions for the delineation of community resource boundaries and local participation in decisions on matters such as the approval of Crown leases and land sales. Some have called for a portion of the proceeds from the use or sale of Crown lands and resources to be directed to local treasuries. These matters receive detailed consideration in the next chapter.

## Communal jurisdiction

While territorial jurisdiction provides an important option for many Aboriginal people, for others it is less attractive or feasible. Large numbers of Aboriginal people do not live on exclusive territorial bases. Moreover, in the mixed areas



where they reside, they are often significantly outnumbered by their non-Aboriginal neighbours. Aboriginal people in this situation are often acutely conscious of the need to maintain and strengthen their cultures and identities. For them, communal jurisdiction represents an appropriate way to fulfil this need. (For a full explanation of how governance questions relate to urban Aboriginal people, see Volume 4, Chapter 7.)

Communal jurisdiction comes in many forms, sometimes combined with territorial arrangements. The submissions, briefs and research studies suggest three main approaches to the subject:

- initiatives featuring territorially based governments exercising jurisdiction over citizens living off the territorial base (the extraterritorial approach);
- initiatives (mainly Métis) featuring multi-level governments with a mix of communal and territorial jurisdiction (the layered approach); and
- initiatives that form urban communities of interest composed of people from various Aboriginal nations (the community of interest approach).

We examine several proposals and initiatives that illustrate these three approaches. While most of the proposals relate to urban areas, some also apply or could be adapted to rural settings.

### *The extraterritorial approach*

Many First Nations people living in urban areas maintain a strong sense of connection with their nations and communities of origin and would like to strengthen these ties. As a representative of the Saskatoon Urban Treaty Indians stated,

there has to be a process that respects the aspirations of urban treaty peoples in the full and free exercise of our inherent rights to representation regardless of residency. Urban groups such as ours need the flexibility to address concerns with all levels of government. Therefore, we seek to dialogue with our First Nation governments to forge a relationship that will mutually benefit our treaty peoples living in the urban centres.

Margaret King  
Saskatoon, Saskatchewan  
28 October 1992

According to many interveners, current legislation and governmental policies separate urban peoples from their nations of origin and fracture their sense of identity. As participants at the Commission's round table on urban issues indicated, rights under the current system are tied to the land:

People who move off a reserve land base are all of a sudden floating....It is not a question of jurisdiction. It is a question of a vacuum.



A participant said her identity changes if she moves, that it isn't tied to her, that it depends on where she lives.<sup>84</sup>

For some, the solution is for First Nations governments to extend their jurisdiction beyond their territories to serve citizens living in urban and other off-reserve settings. The First Nation government could establish service agencies and other institutions to cater to these citizens and could establish structures for their representation and participation in the home government. This solution envisages a form of extraterritorial jurisdiction. Dave White offered an example:

My argument is not to diminish that power or authority [of First Nations on reserves], but to extend it beyond the borders of the reserves so that the people – the Native people in Sudbury and other urban centres – still have that sense of community, of power and responsibility that currently, under the *Indian Act*, only accrues to on-reserve situations.

Dave White  
Sudbury, Ontario  
1 June 1993

Advocates of this approach maintain that extraterritorial initiatives can help bridge the gap between Aboriginal people living on an exclusive land base and those living off this base. According to this view, such initiatives can also help maintain and revitalize the cultures and identities of Aboriginal people in urban areas. Some participants at the Commission's national round table on urban issues affirmed the link between their cultural identity and their communities:

[Our] cultural identities as First Nations people are tied to [our] communities, just as the identities of Métis flow from their settlements. The answer was for each group to extend jurisdiction from these home territories over the Aboriginal urban population.<sup>85</sup>

An example of this approach is the *Act Respecting Self-Government for First Nations in the Yukon Territory*.<sup>86</sup> Under this act, a Yukon First Nation has certain powers to enact laws and provide services for its citizens throughout the entire Yukon Territory, in addition to jurisdiction over its exclusive settlement area. These extraterritorial powers are optional and permit a First Nation to offer programs and services in a number of crucial areas: spiritual and cultural matters, Aboriginal languages, health care, social and welfare services, training programs, education, and dispute resolution outside the courts. First Nations governments also have extraterritorial powers regarding guardianship and custody of children, inheritance, wills and estates, determination of mental competency, solemnization of marriage, and granting of licences.

Another example of the extraterritorial approach is furnished by the Siksika Nation in Alberta, whose long-term plans for self-government consider the

needs of its citizens living in urban areas. Under its present negotiations for self-government, the Siksika Nation proposes that its reserve-based government have jurisdiction over all Siksika citizens, both on and off the reserve, and that it take full responsibility for providing programs and services to them. As a step in this direction, the Siksika Nation has signed a protocol agreement with the Siksika Urban Association in Calgary, where a significant number of Siksika citizens live. This agreement affirms that all Siksika belong to the Siksika Nation, regardless of place of residence, and as such are entitled to representation by the Siksika Nation chief and council.<sup>87</sup>

Extraterritorial initiatives in urban areas have been launched not only by local First Nation communities but also by tribal, regional and provincial organizations. For example, the Touchwood File Hills Qu'Appelle council, composed of sixteen First Nations communities near the city of Regina, provides numerous programs and services to its urban members.<sup>88</sup> Some provincial First Nations organizations have also begun to address the needs and concerns of urban peoples, although these initiatives are often still in their early stages.<sup>89</sup>

### *The layered approach: Métis initiatives*

The need for Métis-specific institutions of governance was a consistent theme in submissions to the Commission. Briefs and research studies from the Métis National Council, the Metis Society of Saskatchewan and the Manitoba Metis Federation all called for initiatives directed specifically to Métis populations in urban areas.<sup>90</sup> Marc LeClair states:

The Métis Nation feels strongly that institutions of Métis self-government should be established solely for Métis and categorically rejects approaches to urban self-government which lump Métis into institutions that serve both Indians and Métis.<sup>91</sup>

This position was echoed by Ernie Blais, then president of the Manitoba Metis Federation:

Programs and services for Metis in urban areas must be designed, developed and delivered by Metis government institutions for Metis people. This concept of Metis institutions of self-government has been developed provincially through the Tripartite Negotiations and nationally through the Metis Nation Accord. In all instances, we intend that these Metis institutions will operate in both rural and urban areas and will be operated for the benefit of Metis.

Ernie Blais  
Winnipeg, Manitoba, 2 June 1993

Métis people envisage a multi-layered system with local, regional, provincial and Canada-wide decision-making bodies. Urban areas would be represented

in Métis governments as Métis locals, which would exercise authority delegated from Métis provincial governments. These locals would be structured to suit the needs and priorities of their particular constituencies. They would exist both on and off a land base and would have responsibility for such matters as education, training and employment, housing, social services, justice, health and economic development. In some cases, they would deliver programs and services developed at the provincial or regional level; in other cases, they would develop and deliver their own programs. Where urban areas have large Métis populations, several locals could be created in one area to ensure balanced provincial representation. The presidents of Métis locals would be members of provincial Métis legislatures, which in turn would provide direction to national organizations.

In Saskatchewan, the Metis Society has proposed that a Métis legislative assembly be created of local presidents, the provincial Métis council and representatives of the Metis Women of Saskatchewan. The legislative assembly would meet several times each year to fulfil its mandate as the governing authority of the Metis Nation of Saskatchewan. It would enact laws and regulations governing the internal affairs of the Métis Nation in that province. Members of the provincial Métis council would form the cabinet of the provincial Métis government, with responsibilities for various ministries or portfolios, such as education, health, housing, economic development.<sup>92</sup>

Citizenship for purposes of Métis government would be voluntary, and individual participation would be based on the democratic principle of one person, one vote. In this way, it is anticipated that Métis locals would evolve into effective self-government vehicles for Métis people.<sup>93</sup>

### *The community of interest approach*

The extraterritorial and layered approaches to governance are designed for situations where there are strong continuing ties between urban Aboriginal people and their nations and communities of origin. However, these approaches do not meet the perceived needs of all urban peoples.

Some urban interveners, particularly women, stated that they had become estranged from their communities of origin. Others maintained that mainstream Aboriginal organizations did not adequately reflect the interests and needs of urban residents. As participants at the Commission's national round table on urban issues stated,

Aboriginal organizations claim to represent Aboriginal urban people but involve little accountability and almost no voice for Aboriginal urban people.<sup>94</sup>

Other urban residents identify more strongly with the place where they live than with their community of origin. This tendency was particularly clear in submissions from Aboriginal youth living in cities. Other interveners suggested that

distinctive local Aboriginal cultures have often emerged in urban areas. As Ruth Williams pointed out,

Each urban community has its own culture. There will not be two communities alike. Therefore, they must be able to have their own voice to ensure that community plans for social and economic development reflect the community's needs.

Ruth Williams  
Executive Director, Interior Indian Friendship Society  
Kamloops, British Columbia, 15 June 1993

Furthermore, it may not be possible for urban people to receive services from their community of origin, even if they retain strong links to that community.

The majority of bands, tribal councils and treaty areas do not have the capacity or infrastructure to address off-reserve Aboriginal issues and concerns.... Historically, off-reserve Aboriginal people have had to look after themselves individually, and then over a period of time organize into groups for mutual support.

Dan Smith  
United Native Nations  
Vancouver, British Columbia, 2 June 1993

For all these reasons, many Aboriginal people living in urban areas view communal institutions organized at the local level as best suited to their situation. The Assembly of Aboriginal Peoples of Saskatchewan reported that their members see autonomous self-governing institutions in urban areas as the most appropriate means to autonomy for urban people. Members of the Assembly expressed concerns

about entering into urban self-governing agreements with other off-reserve Indians who had ties back to their reserve homelands. They did not want to see their hopes, aims and aspirations drowned out by alliances with others who took their direction from chiefs and councils.<sup>95</sup>

In its submission, the Native Council of Canada (NCC, now the Congress of Aboriginal Peoples) reported the results of a survey of more than 1,300 Aboriginal people living in six major metropolitan centres. The survey indicated that "virtually all Aboriginal respondents (92%) either strongly (66%) or somewhat strongly (26%) support this effort to have Aboriginal people in urban areas run their own affairs".<sup>96</sup>

The NCC submission discusses four basic models for urban self-government: urban reserves; Aboriginal neighbourhood communities; pan-Aboriginal governments; and sector-specific Aboriginal institutions.<sup>97</sup> The first model envisages establishing urban reserves under the *Indian Act* or other federal legislation. A reserve could be either an autonomous entity or a satellite of an existing reserve



or settlement. In the NCC's view, this model is not generally desirable, especially if it relies on the *Indian Act*, with its tainted legacy of fragmentation and exclusion. The NCC also points out that the satellite option may lead to undesirable situations in which the urban community becomes the effective colony of the home reserve or vice versa.

The second model for urban self-government contemplates a situation in which Aboriginal people form a majority of the residents in a relatively homogeneous urban neighbourhood. It envisages establishing an Aboriginal community government with its own institutions for education, health, housing, policing and other similar services. Unlike the first model, the community government would not be grounded in the *Indian Act*. Moreover, the neighbourhood would not be designated a reserve under federal authority. In the NCC's opinion, this model has advantages; however, given current demographics, there may be few instances in which it can be implemented.

The third model resembles the second but with a city-wide governmental body embracing all Aboriginal people within the urban area rather than a discrete neighbourhood institution. There would be no links with the *Indian Act* and no significant land base. The council views this option as workable and desirable in many contexts.

The fourth model involves single-sector institutions in areas such as education, housing and health. The institutions would be developed and run by Aboriginal people in a manner similar to denominational schools. Although some initiatives of this kind are emerging, the NCC considers that they may encounter significant jurisdictional and financing problems.

Overall, the NCC prefers Aboriginal community governments of the neighbourhood or city-wide varieties. Once these governments are established, they will be in a good position to create sector-specific institutions. The council also anticipates that Aboriginal community governments may find it useful to link together in larger structures embracing an entire region or even the whole country. Such structures might play a variety of roles, ranging from providing information to providing a further level of pan-Aboriginal governance.

## Levels of governance

What is the most desirable level (or levels) for governmental functions? This basic question must be considered in relation to the many visions of governance presented to us. For example, with territorial approaches, should the main governmental unit be the local community, or should it be the larger nation or treaty group?

Distinctive approaches to this issue, reflecting their particular histories, traditions and contemporary circumstances, have been taken by First Nations, Métis people and Inuit. For convenience, we deal with each of these groups separately.

However, many of the approaches have possible application beyond the groups with which they are currently associated.

### *First Nations approaches*

First Nations hold differing views regarding the most appropriate level for governmental institutions. These differences are reflected in the varying ways in which the term First Nation is used. Sometimes, it is used in a broad sense to indicate a body of Indian people whose members have a shared sense of national identity based on a common heritage, situation and outlook, including such elements as history, language, culture, spirituality, ancestry and homeland. Under this usage, a First Nation would often be composed of a number of local communities living on distinct territorial bases. However, in other instances, the term First Nation is used in a narrow sense to identify a single local community of Indian people living on its own territorial base, often a reserve governed by the *Indian Act*.

While many interveners used the term First Nation in the narrower sense, others preferred the broader usage, which they considered more inclusive and consistent with Aboriginal traditions. The Ontario Native Women's Association expressed the following view:

It is recommended that the definition provided by our elders be utilized. When they speak of the First Nations in Ontario, they are speaking of the Algonquin, Cayuga, Cree, Delaware, Iroquois, Metis, Ojibway, Onondaga, Oneida, Seneca and Tuscarora Nations and all their peoples. They are not speaking about the reserves or of treaty organizations, or any other organization. Their definition is in fact independent of the Indian Act and is based on inclusion rather than exclusion.<sup>98</sup>

The same broad usage was reflected in the accounts that Aboriginal people gave of their nation's history and identity. For example, Chief Gerald Antoine supplied the following description of Dene in his testimony to the Commission:

The Dene constitute a nation born of a common heritage within a distinct territorial land base...and having a distinct culture, including laws, beliefs and languages....Dene land use is based on tradition and the technologies and governed by Dene beliefs, customs and laws.

Chief Gerald Antoine  
Fort Simpson, Northwest Territories  
26 May 1992

The Commission uses the term First Nation in the broader sense. By contrast, we use the terms First Nation community or local community to refer to a single community forming part of a First Nation.

The basic issue is whether the principal unit of self-determination and self-government is the local First Nation community, the First Nation as a whole, or some wider grouping. Many interveners maintained that the local community is the principal unit. The Chiefs of Ontario had this to say:

As an essential component of our relationships, we believe in the primacy of the individual community as an embodiment of all that which a nation stands for, that is, the implementation of its inherent right of self-government and jurisdiction within the context of original nationhood. To us, this is the principle of the primacy of the individual First Nation community.<sup>99</sup>

Nevertheless, while many interveners maintained that in principle primary authority rests with the local community, they also recognized that in practice powers and responsibilities would often have to be exercised at higher levels, by governmental bodies representing the entire nation, treaty group, region or province. The result would be multi-level First Nation governments, in which authority spreads upward from the people. This approach is reflected in the following extracts from the hearings:

The United Indian Councils' model recognizes fully autonomous individual First Nations and we have nine First Nations that are involved in this model. Each one of them will be respected and independent of the others on a regular daily basis and we also have a regional government for strength, for economies of scale, for sharing, and for support.

Cynthia Wesley Esquimaux  
Vice-Chief, United Indian Councils  
Orillia, Ontario, 14 May 1993

What we have arrived at is that powers should remain with each of the band councils and everything that is common....[F]or example, health, education, social services, environment and so on, that would be a government that would be called the Montagnais government. But that Montagnais government or that common government of the nine Montagnais communities is a government that would get its responsibilities from the band councils....[W]e want power to stay as close as possible to the people....This is what we call self-government. [translation]

Chief Rémi Kurtness  
Band Council of the Montagnais of Lac-Saint-Jean  
Montreal, Quebec, 26 May 1993

For some First Nations, this division between local and national or regional governments takes a federal or quasi-federal form. For example, the council of

the Attikamek Nation in Quebec is a regional organization comprising three distinct local communities, each with its own band council. The purpose of the Attikamek council is to pursue the common political, social and economic goals of the three local communities, arrange for shared services and mount joint projects. The Attikamek council offers services to its local communities in such areas as public administration, education, social services, community services, economic development and forestry. The Attikamek Nation expects that its governmental structures will continue to develop along federal lines. As Simon Awashish, president of the council of the Attikamek Nation, explained to the Commission,

The structure of the Attikamek government will be both national and local; that is to say that certain aspects of its authority will be exercised at the level of the nation and other aspects of its authority will emanate from each of the three communities. [translation]

Simon Awashish

President, Attikamek Nation Council  
Manawan, Quebec, 3 December 1992

Some First Nations see their tribal or national organizations as a senior level of government, possessing primary authority to deal with other nations. Others envisage First Nations governments organized not only at the level of the community, nation, treaty or region but also Canada-wide. The Fort Albany First Nation community reported support among its members for an arrangement whereby First Nations communities would have primary authority in some areas but would conduct governmental activities in accordance with policies and guidelines developed by a Canada-wide government or organization such as the Assembly of First Nations.

Multi-level structures of governance are not new to First Nations. Many First Nations were traditionally organized in federations and confederacies. The Mi'kmaq Nation is an example of a federal-type association. According to the accounts of interveners, the most basic unit in the Mi'kmaq Nation was the family, which joined together with other families for economic purposes at the local or community level – the level of the extended family or clan – in Mi'kmaq, *wikamow*. At this level, decisions were made concerning internal relations, social and seasonal movements, and assignment of community tasks. Leadership was provided by an individual *sagamaw* who worked closely with a council of elders, generally composed of the heads of families.

The next tier of organization occurred at the district or regional level. The Mi'kmaq homeland of *Mi'kma'ki* comprised seven *sakamowti*, or districts, covering parts of present-day Newfoundland, Nova Scotia, New Brunswick, Prince Edward Island, St. Pierre and Miquelon, the Gaspé peninsula and the Magdalen Islands. The political organization at this level, which included district chiefs,



made decisions regarding war and peace and also assigned hunting territories to the various families living in the district. The highest level of organization was the Mi'kmaq Nation.

All of the sakamowti are represented on the Sant'Mawi'omi, and its leadership is made up of three positions: the Kjisakamow, the Grand Chief, who is the head of state; the Kjikep'tin, Grand Captain or War Chief, is the executive; and the Putu's is the keeper of the Constitution and the rememberer of our treaties. We had full control and jurisdiction over our internal affairs, as any national government would.

Alex Christmas  
President, Union of Nova Scotia Indians  
Eskasoni, Nova Scotia, 6 May 1992

This level of government focused on issues affecting the whole nation, including diplomacy and international relations:

The Grand Council provides an organized structure which maintains customs of land tenure, order between members and regulations between neighbouring nations and tribes.

Chief Geraldine Kelly  
Miawpukek Band, Conne River  
Gander, Newfoundland, 5 November 1992

Nevertheless, the authority of the higher levels of organization depended on the support they received from individual communities:

The authority of the district and national institutions is required from the communities which may be rescinded without notice. This structure certainly promoted accountability of those persons appointed as leaders of their communities, their districts and their Nation.

Brenda Gideon Miller  
Listuguj Mi'gmaq First Nation  
Restigouche, Quebec, 17 June 1993

Many other First Nations, such as the Haudenosaunee, the Wabanaki and the Siksika, were traditionally organized as confederacies rather than federations. The Haudenosaunee Confederacy, for example, incorporated five distinct but linguistically related nations: Mohawk, Onondaga, Oneida, Cayuga and Seneca. The covenant circle of wampum represented the fifty chiefs (*rotiianeson*) of the five nations. It also represented the peace, balance and security that was achieved through the confederacy:

Inside of the circle, the circle of fifty chiefs...is our people, and our future generations....Inside of the circle is our language and our culture, and clans and the ways we organize ourselves politically, and our

ceremonies which reflect our spirituality of our cycle of life. A further meaning of the Covenant Circle is that if at any time one of our Chiefs or our people chooses to submit to the law of a foreign nation, he is no longer part of the Confederacy.

Elizabeth Beauvais  
Kahnawake, Quebec  
6 May 1993

Confederacies generally recognized the equality and autonomy of each member nation. As such, they constituted international organizations, which held shared economic, military and other policies. They were often involved in treaty-making processes with other nations, including European nations.

The Wabanaki Confederacy symbolizes the unity of First Nations. It was and continues to be an international forum for...sharing information and creating alliances with other Nations. The Confederacy was brought together as an alliance during war as it was in times of peace.

Brenda Gideon Miller  
Listuguj Mi'gmaq First Nation  
Restigouche, Quebec, 17 June 1993

### *Métis Nation approaches*

Multi-level governmental structures are a prominent feature of Métis Nation political organization. Four levels of political organization are recognized within the Métis Nation: local, regional, provincial and national. Although recently the main emphasis has been on the last two levels, Métis people also see the local and regional levels as necessary to future Métis governments.

Locally, Métis people envisage governmental institutions organized both on and off territorial bases. Territorial governments would exist mainly in the northern sectors of the western provinces. Off a land base, Métis locals would be the main form of self-governing institution. They would affect only those who chose to participate in them. Métis people in Saskatchewan have emphasized developing local government in their five-year restructuring process. This process is characterized by increased decentralization and accountability, with greater involvement of Métis locals in decision making. In Alberta, the Metis Nation plans to establish community constituencies as base organizations in a provincial Métis government.

Regionally, various forms of political structures are envisaged. The model provided by the Alberta Metis Settlements General Council is composed of the political leaders of all local settlement councils. The council considers itself an example of a successful multi-order political organization.

The Metis Settlements General Council offers one of the most highly developed examples in existence to-date of a *federation* of aboriginal

governments. The General Council is a working model of a type of aboriginal federalism whose operation may provide some useful examples for other aboriginal jurisdictions which might be interested in adopting federative political arrangements.<sup>100</sup>

Regional or zone councils are also part of the present and future structure of Métis government in Alberta. As currently envisaged, representation in provincial executive bodies, including a Métis cabinet, would be drawn from each of six regional zones.

In recent years, some Métis people have considered transforming their provincial associations into governmental bodies based on adapted parliamentary models. The following excerpt from the Manitoba Metis Federation's case study outlines one such approach:

Metis governance structures would promote Metis rights at the provincial and federal level while respecting the autonomy of the Metis at the community and regional levels. They could take the form of a provincial Metis legislative assembly mandated to enact legislation and administrative orders at periodic assemblies and be comprised of Local presidents. A provincial executive council or Cabinet elected on a province-wide basis would be empowered to implement the legislation through its various departments such as economic development, social services, housing, etc.<sup>101</sup>

Governmental structures are also anticipated for the entire Métis Nation. The Métis Nation sees itself as a unified political entity, both historically and today. The primary role of a Canada-wide Métis Nation government, acting through an institution such as a parliament, would be to represent all its citizens on issues affecting their collective welfare and to establish national institutions in areas such as culture and communications.

### *Inuit approaches*

Inuit governmental initiatives feature multi-level structures. It is anticipated that the future territorial government of Nunavut will incorporate both community governments and advisory regional bodies.<sup>102</sup> Similar arrangements are foreseeable in regions of the territorial and provincial north where a significant majority of inhabitants are Inuit, such as northern Quebec and the western Arctic.

Inuvialuit of the western Arctic anticipate creating a regional government, to be called the Western Arctic District (or Regional) Government, which would embrace a number of local community governments.<sup>103</sup> The government could comprise the four Inuvialuit communities of Holman Island, Paulatuk, Sachs Harbour and Tuktoyaktuk, the mixed Inuvialuit-Gwich'in communities of Aklavik and Inuvik on the Mackenzie Delta, and the predominantly

Gwich'in communities of Arctic Red River and Fort McPherson. The inclusion of First Nations communities would create a unique pan-Aboriginal form of public government.

The Western Arctic District Government would have representatives from each local community, with a few other members elected at large. The district government's powers would be limited to those that the local communities, through their representatives in the regional assembly, confer on the government. The district government's main task would be to co-ordinate local government activities. It would increase efficiency and effectiveness by creating regional standards, and it would secure greater control for residents over lands, resources and the off-shore. Delivery of services would remain primarily the responsibility of local community governments. While this model shares jurisdiction between the local community and the district government, the proposed legislative authority could be exercised by the district only with the consent of the local communities. The district government is primarily a vehicle for empowering local communities. The proposals of many First Nations communities assign primacy to the governments that are closest to the people.

In summary, most Aboriginal peoples contemplate exercising their right of self-determination in ways that involve multi-level governments. At the same time, many Aboriginal people have concerns about the excessive concentration of authority in larger political structures, whether at the level of the nation, treaty group, region, province or country. There is a widespread conviction that locally important powers and responsibilities should rest with the local community, not with government one or more steps removed from the people to be served. This conviction raises important issues of principle and policy which we discuss in the next section.

## 2. TOWARD AN ABORIGINAL ORDER OF GOVERNMENT

### 2.1 An Overview

Can the various visions of governance held by Aboriginal peoples in Canada be realized today? In our view, the answer is a resounding yes. We believe that the right of self-determination and the constitutional right of self-government together provide a strong basis for realizing Aboriginal aspirations. In this section, we describe the basic principles that support and guide this important process. We also provide some suggestions for implementing self-government.

#### Attributes of good government

To be effective – to make things happen – any government must have three basic attributes: legitimacy, power and resources.<sup>104</sup> Legitimacy refers to public con-



fidence in and support for the government. Legitimacy depends on factors such as the way the structure of government was created, the manner in which leaders are chosen, and the extent to which the government advances public welfare and honours basic human rights. When a government has little legitimacy, leaders have to work against public apathy or resistance and expend more power and resources to get things done.

Power is the acknowledged legal capacity to act. It includes legislative competence (the authority to make laws), executive capacity to execute the laws and carry on public administration, and judicial jurisdiction to resolve disputes. The power of a government may arise from long-standing custom and practice or from more formal sources such as a written constitution, national legislation and court decisions. Internal legal authority, however, is not always enough to make a government effective. Another important factor is the degree to which other powerful governments and institutions recognize and accept what is done by the government. Claims to sovereignty and other forms of legal authority may be of limited use if they are not respected by other governments holding greater power and resources.

Resources consist of the physical means of acting – not only financial, economic and natural resources for security and future growth, but information and technology as well as human resources in the form of skilled and healthy people. Resources are necessary to exercise governmental power and to satisfy the needs and expectations of citizens. Key resource issues include the nature of fiscal and trade relationships among governments, which affect the control and adequacy of resources.

A government lacking one or more of these attributes will be hampered in its operations. For example, a government that enjoys great legitimacy but has insufficient power or resources will be able to accomplish little and will remain largely symbolic – especially if it is competing with other political institutions that do wield substantial power and resources. By contrast, some governments have both power and resources but little legitimacy. To maintain themselves, they must rely on manipulation, intimidation and coercion. Where a government has some power but is lacking in both resources and legitimacy, it is likely to become both oppressive and dependent. To maintain itself, the regime must seek resources from other governments. In return, these benefactors become the real decision makers, imposing conditions on continued financial support and investment. Such dependence makes governments more responsive to their external taskmasters than to their own citizens. This in turn erodes whatever legitimacy they originally possessed, accelerating the need for repressive domestic measures.

Aboriginal governments in Canada often lack all three attributes necessary to be effective. First, the legitimacy of some of these governments is weak because they evolved from federally imposed institutions and historically have

been unable to satisfy many basic needs of their citizens, in part because of deficits in power and resources. Sometimes these governments have also failed to embody such basic Aboriginal values as consensus, harmony, respect for individuality and egalitarianism. Second, current Aboriginal governments have far less power than their provincial, territorial and federal counterparts. What power they possess is frequently insecure and depends mainly on federal legislation or even ministerial approval. Third, Aboriginal governments generally lack a sufficient tax and resource base and are highly dependent on federal funding for their basic operations. This funding has often been conditional, discretionary and unpredictable, fluctuating substantially over time.

What remedies do we see for these deficiencies? First, to put in place fully legitimate governments, Aboriginal peoples must have the freedom, time, encouragement and resources to design their own political institutions, through inclusive processes that involve consensus building at the grassroots level. Popular control of the process of constitution building is much more important than the technical virtuosity of the final product. In other words, Aboriginal peoples have the right of self-determination and now require the means to implement this right.

Second, to possess sufficient power, Aboriginal governments must have a secure place in the constitution of Canada, one that puts them on a par with the provincial and federal governments and does not depend on federal legislation or court decisions. The effectiveness of Aboriginal governments will depend on their ability to devote their energies to improving the welfare of their constituents rather than continuously asserting, defending and redefining their legal status. In other words, Aboriginal peoples' right of self-government must be recognized.

Finally, Aboriginal peoples must have adequate collective wealth of their own, in the form of land and access to natural resources, to minimize dependence on external funding and the political constraints that accompany it. No Aboriginal government, regardless of the quality and ideals of its personnel, can be fully accountable to its citizens if its basic operations are paid for by the federal government.

These three themes, among others, are discussed in the remainder of this chapter. First, we deal with the right of self-determination. Then, we consider the constitutional right of self-government under section 35 of the *Constitution Act, 1982*. Later in the chapter we discuss financial capacity. (Economic autonomy is discussed in Chapters 4 and 5.)

### **Self-determination and self-government: overview**

In this section we discuss the relationship between the principles of self-determination and self-government and Aboriginal peoples, their governments and the evolution of Canada's constitution. The right of self-determination is vested

in all the Aboriginal peoples of Canada, including First Nations, Inuit and Métis. It is founded in emerging norms of international law and basic principles of public morality. Self-determination entitles Aboriginal peoples to negotiate the terms of their relationship with Canada and to establish governmental structures that they consider appropriate for their needs.

Aboriginal peoples are not racial groups; they are organic political and cultural entities. Although contemporary Aboriginal peoples stem historically from the original peoples of North America, they often have mixed genetic heritages and include individuals of varied ancestries. As organic political entities, they have the capacity to evolve over time and change in their internal composition.

The Commission considers the right of self-determination to be vested in Aboriginal nations rather than small local communities. By Aboriginal nation, we mean a sizeable body of Aboriginal people with a shared sense of national identity that constitutes the predominant population in a certain territory or group of territories. There are 60 to 80 historically based nations in Canada at present, comprising a thousand or so local Aboriginal communities.

Aboriginal peoples are entitled to identify their own national units for purposes of exercising the right of self-determination. For an Aboriginal nation to exercise the right of self-determination, it does not have to be recognized as a nation by the federal government or by provincial governments. Nevertheless, unless other Canadian governments are prepared to acknowledge the existence of Aboriginal nations and to negotiate with them, such nations may find it difficult to exercise their rights effectively, so in practice there is a need for the federal and provincial governments actively to acknowledge the existence of the various Aboriginal nations in Canada and to negotiate with them to implement their right of self-determination.

Self-determination is the starting point for Aboriginal initiatives in governance but it is not the only possible basis for such initiatives. As a matter of Canadian constitutional law, Aboriginal peoples also have the inherent right of self-government within Canada. This right stems from the original status of Aboriginal peoples as independent and sovereign nations in the territories they occupied. This status was recognized and recast in the numerous treaties, alliances and other relations maintained with the incoming French and British Crowns. This extensive practice gave rise to a body of intersocietal customary law that was common to the parties and eventually became part of the law of Canada.

In our view, the inherent right of Aboriginal self-government was recognized and affirmed in section 35(1) of the *Constitution Act, 1982* as an Aboriginal and treaty right. The inherent right is now entrenched in the Canadian constitution, therefore, and provides a basis for Aboriginal governments to function as one of three distinct orders of government in Canada.

The constitutional right of self-government does not supersede the right of self-determination or take precedence over it. Rather, the constitutional right



of self-government is available to Aboriginal peoples who wish to take advantage of it, in addition to their right of self-determination, treaty rights, and any other rights that they currently enjoy or negotiate in the future. The constitutional right of self-government is one of a range of voluntary options available to Aboriginal peoples.

Generally, the sphere of inherent Aboriginal jurisdiction under section 35(1) of the *Constitution Act, 1982* comprises all matters relating to the good government and welfare of Aboriginal peoples and their territories. This sphere of inherent jurisdiction is divided into two sectors: a core and a periphery.

In our opinion, the core of Aboriginal jurisdiction includes all matters that (1) are vital to the life and welfare of a particular Aboriginal people, its culture and identity; (2) do not have a major impact on adjacent jurisdictions; and (3) are not otherwise the object of transcendent federal or provincial concern. An Aboriginal group has the right to exercise authority and legislate at its own initiative, without the need to conclude self-government treaties or agreements with the Crown.

The periphery of Aboriginal jurisdiction comprises the remainder of the sphere of inherent Aboriginal jurisdiction. It includes matters that have a major impact on adjacent jurisdictions or that attract transcendent federal or provincial concern. Such matters require substantial co-ordination among Aboriginal, federal and provincial governments. In our view, an Aboriginal group cannot legislate at its own initiative in this area until a self-government treaty or agreement has been concluded with the Crown.

When an Aboriginal government passes legislation regarding a subject that falls within the core jurisdiction, any inconsistent federal or provincial legislation is automatically displaced. An Aboriginal government may thus expand, contract or vary its exclusive range of operations to match its needs and circumstances. Where there is no inconsistent Aboriginal legislation in a core area of jurisdiction, federal and provincial laws continue to apply within their respective areas of legislative jurisdiction.

When a federal law and an Aboriginal law conflict, sometimes the federal law may take precedence over the Aboriginal law. However, for this to happen, the federal law must meet the strict standard laid down by the Supreme Court of Canada in the *Sparrow* decision. Under this standard, the law must serve a compelling and substantial federal objective and be consistent with the Crown's basic fiduciary responsibilities to Aboriginal peoples.<sup>105</sup>

In relation to matters on the periphery of Aboriginal jurisdiction, a self-government treaty or agreement is needed to settle the jurisdictional overlap between an Aboriginal government and the federal and provincial governments. This treaty must specify which areas of jurisdiction are exclusive and which are concurrent; in the latter case, the treaty must specify which legislation will prevail if a conflict arises. Until such an agreement is concluded, Aboriginal juris-



diction on the periphery remains in abeyance, and federal and provincial laws continue to apply within their respective areas of legislative jurisdiction. A treaty dealing with the inherent right of self-government gives rise to treaty rights under section 35(1) of the *Constitution Act, 1982* and thus becomes constitutionally entrenched. Even when a self-government agreement does not itself constitute a treaty, rights articulated in it may nevertheless become constitutionally entrenched.

In our view, the *Canadian Charter of Rights and Freedoms* applies to Aboriginal governments and regulates relations with individuals within their jurisdiction. However, under section 25, the Charter must be interpreted flexibly to account for the distinctive philosophies, traditions and cultural practices of Aboriginal peoples. Moreover, under section 33, Aboriginal nations can pass notwithstanding clauses that suspend the operation of certain Charter sections for a period. At the same time, sections 28 and 35(4) of the *Constitution Act, 1982* ensure that Aboriginal women and men are in all cases guaranteed equal access to the inherent right of self-government and are entitled to equal treatment by their governments.

Only nations can exercise the full range of governmental powers available in the core areas of Aboriginal jurisdiction; nations alone have the power to conclude self-government treaties or agreements regarding matters falling within the periphery. The constitutional right of self-government is vested in the peoples who make up Aboriginal nations, not in local communities. Nevertheless, local communities of Aboriginal people, including communities in urban areas, have access to inherent governmental powers if they join together in their national units and draft a constitution allocating powers between the national and local levels.

Under section 35 of the *Constitution Act, 1982*, an Aboriginal nation has the right to determine which individuals belong to the nation. However, this right is subject to two limitations. First, it cannot be exercised in a manner that is discriminatory toward women or men. Second, it cannot specify a minimum 'blood quantum' as a general prerequisite for citizenship. Modern Aboriginal nations, like other nations in the world today, represent a mixture of genetic heritages. Their identity lies in their collective life, their history, ancestry, culture, values, traditions and ties to the land, rather than in their race.

Overall, the enactment of section 35 of the *Constitution Act, 1982* has had far-reaching significance. It confirms the status of Aboriginal peoples as equal partners in the complex federal arrangements that constitute Canada. It provides the basis for recognizing Aboriginal governments as constituting one of three orders of government in Canada: Aboriginal, provincial and federal. These governments are sovereign within their several spheres and hold their powers by virtue of their inherent status rather than by delegation. In other words, they share the sovereign powers of Canada, powers that represent a pooling of existing sovereignties.

Aboriginal peoples also have a special relationship with the Canadian Crown, which the courts have described as *sui generis* or one of a kind. This relationship traces its origins to the treaties and other links formed over the centuries and to the intersocietal law and custom that underpinned them. Because of this relationship, the Crown acts as the protector of the sovereignty of Aboriginal peoples within Canada and as guarantor of their Aboriginal and treaty rights. This fiduciary relationship is a fundamental feature of the constitution of Canada.

## 2.2 Self-Determination

### International human rights law

In our view, the Aboriginal peoples of Canada possess the right of self-determination.<sup>106</sup> This right is grounded in emerging norms of international law and basic principles of public morality.

Canada has played an important role in articulating international human rights standards. It is a signatory to a number of international human rights instruments, including the Charter of the United Nations which includes the Universal Declaration of Human Rights; the International Covenant on Civil and Political Rights; and the International Covenant on Economic, Social and Cultural Rights. Yet the historical process by which Canada was formed involved a denial of the right of its first peoples to self-determination. The process was tainted by widespread misrepresentation, fraud and outright coercion as well as by broken promises, dispossession and exclusion. There is now a basic and pressing need for Aboriginal peoples to be able to negotiate freely the terms of their continuing relationship with Canada and to establish governmental structures that are in keeping with their aspirations and traditions.

The problem with international law instruments is their implementation and enforcement within the states that become parties to them. Paul Sieghart explains:

Regrettably, states differ a great deal in the 'good faith' with which they perform their international legal obligations in the field of human rights. A few are excellent, and will not even ratify such a treaty until *after* they have passed all the necessary legislation, and made all the other necessary internal arrangements, to ensure that they will comply fully as soon as they become bound. At the opposite extreme, there are states which adhere to every treaty in sight, and then do nothing at all towards performing their legally binding promises.<sup>107</sup>

Because of the fundamental proposition of law that a right without a remedy is meaningless, international human rights instruments generally have to be supported by domestic legislation in countries that sign them. If no such

domestic legislation is passed, the fact that a particular country is a signatory does not, of itself, entitle a citizen to take action against the state in its domestic courts, even if the state has violated its undertakings in an international convention or covenant to which it is a party. This does not mean that international instruments are of no help to the citizen. They have significant interpretive value in situations where a case against the state is founded on violation of domestic human rights legislation such as the *Canadian Charter of Rights and Freedoms*. Justice Linden made this point in relation to the International Covenant on Civil and Political Rights, which protects the right of all peoples to self-determination, including the right freely to determine their political status and to pursue their economic, social and cultural development.

On May 19, 1976 Canada acceded to the United Nations Covenant on Civil and Political Rights...no Canadian legislation has been passed which expressly implements the covenant...The covenant may, however, be used to assist a court to interpret ambiguous provisions of a domestic statute...provided that the domestic statute does not contain express provisions contrary to or inconsistent with the covenant....This rule of construction is based on the presumption that Parliament does not intend to act in violation of Canada's international obligations.<sup>108</sup>

Each state is expected, and in some cases obliged, to establish its own system for enforcing its international commitments in a manner compatible with its own constitution and legal system.

If the domestic law of the signatory state provides no enforcement system, there may be recourse to international law forums that entertain complaints from disaffected states and citizens, investigate them, and make reports and recommendations. This is all they can do, however; they have no enforcement powers within individual nation-states.

The International Covenant on Economic, Social and Cultural Rights, to which Canada is a signatory, affirms the right of all human beings to, among other things, gainful employment and an adequate standard of living, protection and support for the family, health and education, and the conservation and development of their cultures. However, the obligations of signatory states under the covenant are not absolute. They are relative and progressive. Article 2 reads:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present covenant by all appropriate means, including particularly the adoption of legislative measures.<sup>109</sup>

The one requirement stated in Article 2 is that there be no discrimination by a state in the discharge of its obligations under the covenant; whatever it does, for example, in the field of health or education, it must do for the benefit of all its citizens, not just for some.

Preventing discrimination against Indigenous peoples became a focus of United Nations attention in the 1960s and 1970s following major studies in a number of countries. In 1982, the United Nations established the Working Group on Indigenous Populations under the aegis of the International Labour Organisation (ILO), the UN agency whose primary concern is social justice. Five non-governmental organizations participate in a continuing forum at the annual meetings of the Working Group on Indigenous Populations. They are the World Council of Indigenous Peoples, the International Indian Treaty Council, the Indian Law Resource Centre, the Inuit Circumpolar Conference, and a recently formed body representing four First Nations groups in the United States and Canada, the Four Directions Council.

The working group has drawn up a Draft Declaration on the Rights of Indigenous Peoples, which recognizes the right of Indigenous peoples to self-determination. This draft declaration is now being considered by the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities.<sup>110</sup> Its preamble affirms that Indigenous peoples are equal in dignity and rights to all other peoples. It notes that Indigenous peoples have been deprived of their human rights and fundamental freedoms, resulting in colonization and the dispossession of their lands, territories and resources. The preamble recognizes that Indigenous peoples have the right freely to determine their relationships with states in a spirit of coexistence, mutual benefit and full respect. In light of these and other considerations, Article 3 of the draft declaration states:

Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

The basis and scope of the indigenous right of self-determination are explained by Erica-Irene Daes, who chairs the Working Group on Indigenous Populations, in an explanatory note concerning the draft declaration.

With few exceptions, indigenous peoples were never a part of State-building. They did not have an opportunity to participate in designing the modern constitutions of the States in which they live, or to share, in any meaningful way, in national decision-making. In some countries they have been excluded by law or by force, but in many countries...they have been separated by language, poverty, misery, and the prejudices of their non-indigenous neighbours. Whatever the reason, indigenous peoples in most countries have never been, and



are not now, full partners in the political process and lack others' ability to use democratic means to defend their fundamental rights and freedoms.<sup>111</sup>

How should the international community respond to this situation in which Indigenous peoples lack effective partnership in the governments of existing states? The most appropriate response, writes Daes, is to recognize that Indigenous peoples have the right of self-determination. This means, as she explains,

[T]he existing State has the duty to accommodate the aspirations of indigenous peoples through constitutional reforms designed to share power democratically. It also means that indigenous peoples have the duty to try to reach an agreement, in good faith, on sharing power within the existing State, and to exercise their right to self-determination by this means and other peaceful ways, to the extent possible.

In other words, the right of self-determination should ordinarily be interpreted as entitling Indigenous peoples to negotiate freely their status and mode of representation within existing states. It does not, in Daes' view, normally give rise to a right of secession.

Once an independent State has been established and recognized, its constituent peoples must try to express their aspirations through the national political system, and not through the creation of new States. This requirement continues unless the national political system becomes so exclusive and non-democratic that it no longer can be said to be "representing the whole people".

The declaration on the rights of Indigenous peoples is still in draft form. It will probably undergo changes after further deliberation on its terms within the United Nations. Nevertheless, we consider that Article 3, understood in the light of Daes' remarks, expresses the basic sense of emerging international norms relating to Indigenous peoples.

The right of self-determination is held by all the Aboriginal peoples of Canada, including First Nations, Inuit and Métis people. It gives Aboriginal peoples the right to opt for a large variety of governmental arrangements within Canada, including some that involve a high degree of sovereignty. However, it does not entitle Aboriginal peoples to secede or form independent states, except in the case of grave oppression or a total disintegration of the Canadian state.

The right of self-determination gives Aboriginal peoples the right to initiate changes in their governmental arrangements within Canada and to implement such reforms by negotiations and agreements with other Canadian governments, which have the duty to negotiate in good faith and in light of fiduciary obligations owed by the Crown to Aboriginal peoples. Any reforms must

be approved by the Aboriginal people concerned through a democratic process, ordinarily involving a referendum. Where these reforms necessitate alterations in the Canadian constitution, they must be implemented through the normal amending procedures laid out in the *Constitution Act, 1982*.

Canada has not yet become a signatory to the International Labour Organisation Convention No. 169 on Indigenous Peoples, an important international agreement that came into force in 1991 and that eight states have already ratified. The convention deals with such sensitive subjects as the ownership of traditional Aboriginal lands, the ownership of reserve lands, customary penal justice issues, and the funding of Aboriginal educational institutions, subjects that fall within both federal and provincial jurisdiction. It also contains a general override clause stating that implementation measures must be determined "in a flexible manner having regard to the conditions characteristic of each country".<sup>112</sup>

The practice in Canada has been to sign such a convention only if all the provinces agree and undertake to implement the convention requirements pertaining to their respective jurisdictions. It will be necessary, therefore, for the federal government to consult with the provinces as well as with Aboriginal peoples before signing the convention. In our view, however, Canada should proceed expeditiously to complete these consultations and sign the convention, particularly in light of the override clause.

There is no doubt that the international enforcement machinery of international human rights is extremely weak. Unless nation-states that have made a commitment to international human rights enact appropriate domestic legislation, they can ignore their commitment with impunity, at least regarding their own citizens. A strong argument can be made, however, that the fiduciary obligations owed by Canadian governments to protect the rights of the Aboriginal peoples of Canada requires the enactment of such domestic legislation. How can Canada undertake to achieve the full realization of Aboriginal peoples' rights under the economic, social and cultural rights covenant "by all appropriate means, including particularly the adoption of legislative measures" and then, as a fiduciary, fail to do the very thing required to give Aboriginal peoples recourse in its own courts?

## CONCLUSIONS

1. The Commission thus concludes that the right of self-determination is vested in all the Aboriginal peoples of Canada, including First Nations, Inuit and Métis peoples. The right finds its foundation in emerging norms of international law and basic principles of public morality. By virtue of this right, Aboriginal peoples are entitled to negotiate freely the terms of their relationship with Canada and to establish governmental structures that they consider appropriate for their needs.

2. When exercised by Aboriginal peoples within the context of the Canadian federation, the right of self-determination does not ordinarily give rise to a right of secession, except in the case of grave oppression or disintegration of the Canadian state.

## RECOMMENDATION

The Commission recommends that

### Self-Determination 2.3.1

and International  
Law

The government of Canada take the following actions:

- (a) enact legislation affirming the obligations it has assumed under international human rights instruments to which it is a signatory in so far as these obligations pertain to the Aboriginal peoples of Canada;
- (b) recognize that its fiduciary relationship with Aboriginal peoples requires it to enact legislation to give Aboriginal peoples access to a remedy in Canadian courts for breach of Canada's international commitments to them;
- (c) expressly provide in such legislation that resort may be had in Canada's courts to international human rights instruments as an aid to the interpretation of the Canadian *Charter of Rights and Freedoms* and other Canadian law affecting Aboriginal peoples;
- (d) commence consultations with provincial governments with the objective of ratifying and implementing International Labour Organisation Convention No. 169 on Indigenous Peoples, which came into force in 1991;
- (e) support the Draft Declaration of the Rights of Indigenous Peoples of 1993, as it is being considered by the United Nations;
- (f) immediately initiate planning, with Aboriginal peoples, to celebrate the International Decade of Indigenous Peoples and, as part of the events, initiate a program for international exchanges between Indigenous peoples in Canada and elsewhere.

### Self-determination and self-government

It is important to distinguish between self-determination and self-government. Although closely related, the two concepts are distinct and involve different prac-

tical consequences. Self-determination refers to the right of an Aboriginal nation to choose how it will be governed – whether, for example, it should adopt separate governmental institutions or join in public governments that embrace Aboriginal and non-Aboriginal people alike. Self-government, by contrast, is one natural outcome of the exercise of the right of self-determination and refers to the right of peoples to exercise political autonomy. Self-determination refers to the collective power of choice; self-government is one possible result of that choice.

Some examples may clarify the distinction. Perhaps the most likely situation will be where a single Aboriginal nation exercises its right of self-determination in favour of autonomous self-government within its own territory. It would create its own institutions of government, enact and administer its own laws, create its own policies, and provide programs and services to its own members. It would have exercised its right of self-determination in favour of autonomous Aboriginal nation government.

Other sorts of cases may arise where several distinct Aboriginal nations live alongside one another, each with the right of self-determination. At some point, these nations may decide to set up a confederal form of Aboriginal government. Each nation holds a referendum in which the proposed arrangements are approved by the voters. As a result, a new confederal government is created that embraces all the nations concerned and allows for powers to be exercised at a variety of levels, including the local community, the nation and the confederation as a whole. In this case, each participating nation exercised its right of self-determination in agreeing to the new confederal arrangements. Under these arrangements, the confederated group as a whole exercises a collective right of self-government on behalf of the several participating nations.

Consider another example. An Aboriginal nation forms the majority of inhabitants in a region with a population of both Aboriginal and non-Aboriginal people. The Aboriginal nation decides by way of referendum to support the creation of a new public government that embraces all the residents of the region. In making this decision, the Aboriginal nation exercises its right of self-determination. The new structures of public government are formed as a result of this decision, and they constitute the mode by which the Aboriginal nation has chosen to be governed.

The distinction between self-determination and self-government has an important practical consequence. In our view, an Aboriginal group's right of self-determination is not exhausted for all time when it agrees to a particular governmental structure. Circumstances can change in ways that affect the justness or viability of the original arrangement. The other parties to an agreement may fail to fulfil their side of the bargain in some fundamental way. In such a case, the group may be entitled to exercise its right of self-determination afresh and opt for governmental arrangements that better meet its needs and aspirations. Generally speaking, however, an exercise of the right of self-determination that



has serious implications for other governments and people should not be retracted lightly.

For example, it could be argued that the Métis Nation of Red River exercised a right of self-determination when it participated in creating the province of Manitoba in 1870. It does not follow, however, that the Métis Nation's right of self-determination was exhausted by this action. In our view, the arrangement made in 1870 was gravely compromised by the subsequent process that effectively deprived Métis people of their land rights. Therefore, the right of self-determination continues to exist and may be exercised today in a manner that suits the changed circumstances of the Métis Nation.

Another example: Inuit of the eastern sector of the Northwest Territories have recently exercised their right of self-determination in deciding to establish a public government in the new territory of Nunavut. That decision was influenced in part by the fact that Inuit form a considerable majority of the area's residents and so are in a good position to protect their culture, language and communal interests through institutions of public government. However, should conditions in the territory change significantly (for example, a large influx of non-Aboriginal people), Inuit could review their earlier decision and negotiate alternative governmental arrangements.

### **Aboriginal peoples: political groups, not racial minorities**

For purposes of self-determination, Aboriginal peoples should be seen as organic political and cultural entities, not groups of individuals united by racial characteristics.<sup>113</sup>

One of the greatest barriers standing in the way of creating new and legitimate institutions of self-government is the notion that Aboriginal people constitute a "disadvantaged racial minority" .... Only when Aboriginal peoples are viewed, not as "races" within the boundaries of a legitimate state, but as distinct political communities with recognizable claims for collective rights, will there be a first and meaningful step towards responding to Aboriginal peoples' challenge to achieve self-government.<sup>114</sup>

As the Inuit Tapirisat of Canada observes,

It is not our race in the sense of our physical appearance that binds Inuit together, but rather our culture, our language, our homelands, our society, our laws and our values that make us a people. Our humanity has a collective expression, and to deny us that recognition as a people is to deny us recognition as equal members of the human family.<sup>115</sup>

Of course, not every group that proclaims itself Aboriginal automatically qualifies for that status. A group must have sufficient historical continuity with the peoples who originally inhabited the continent before extensive European settlement took place in the area. That continuity can be established in various ways. While the predominant ancestry of group members is clearly a relevant consideration, it must be weighed alongside other factors such as the group's traditions, political consciousness, laws, language, spirituality and ties to the land. No single factor is decisive; it is the overall pattern of characteristics that matters. In particular, for a group to qualify as Aboriginal, it does not have to be composed of individuals with a certain quantum of supposed Aboriginal blood.<sup>116</sup> (This subject is discussed later, in relation to citizenship.)

A group has to show historical continuity with the peoples originally inhabiting a certain area only before extensive European settlement took place, not before European contact. This criterion recognizes the fact that, in some parts of Canada, relations existed between Indigenous peoples and newcomers for long periods before a substantial influx of settlers occurred. As a result, there was a blending of cultural and genetic heritages. In western Canada, for example, close ties developed between Indigenous peoples and Europeans in the course of the fur trade, ties that were consolidated during the seventeenth and eighteenth centuries, long before the advent of extensive settlement. These relations led to significant changes in the culture and make-up of many Aboriginal groups and their European partners. In particular, they gave rise to an entirely new Aboriginal people, the Métis Nation of Red River, who have played a prominent role in the history of western Canada and the evolution of the Canadian federation.

## CONCLUSION

3. Aboriginal peoples are not racial groups; rather they are organic political and cultural entities. Although contemporary Aboriginal groups stem historically from the original peoples of North America, they often have mixed genetic heritages and include individuals of varied ancestry. As organic political entities, they have the capacity to evolve over time and change in their internal composition.

### The Aboriginal nation as the vehicle for self-determination

Which Aboriginal groups hold the right of self-determination? Is the right vested in small local communities of Aboriginal people, many numbering fewer than several hundred individuals? Were this the case, a village community would be entitled to opt for the status of an autonomous governmental unit on a par

with large-scale Aboriginal groups and the federal and provincial governments. In our opinion, this would distort the right of self-determination, which as a matter of international law is vested in 'peoples'. Whatever the more general meaning of that term, we consider that it refers to what we will call 'Aboriginal nations'.

We use the term nations rather than peoples to avoid possible confusion. Section 35(2) of the *Constitution Act, 1982* speaks of the Aboriginal peoples of Canada as including three groups: "the Indian, Inuit and Métis peoples of Canada". While it is possible that all Inuit, for example, constitute an Aboriginal people of Canada with a right of self-determination, we also consider that certain Inuit sub-groups clearly qualify for that status as well. The same observation holds true of certain sub-groups within First Nations and Métis peoples. In other words, the three Aboriginal peoples identified in section 35(2) encompass nations that also hold the right of self-determination.

As understood here, an Aboriginal nation is a sizeable body of Aboriginal people with a shared sense of national identity that constitutes the predominant population in a certain territory or collection of territories. There are three elements in this definition: collective sense of identity; size as a measure of capacity; and territorial predominance.

The first element, a collective sense of identity, can be based on a variety of factors. It is usually grounded in a common heritage, which comprises such elements as a common history, language, culture, traditions, political consciousness, laws, governmental structures, spirituality, ancestry, homeland or adherence to a particular treaty. Aboriginal groups sharing a common heritage constitute what can be described as historical nations, because the factors that unite them have deep roots in the past. Such groups as the Huron, the Mohawk, the Nisga'a, the Haida and the Métis of Red River, among others, are examples. However, historical nations are not the only groups capable of holding a right of self-determination. In other cases, a sense of national identity may flow less from a common heritage than from a shared contemporary situation and outlook, involving such factors as similar background and historical experience, geographical proximity and the resolve to pursue a common destiny through joint governmental arrangements. Because of these considerations, certain emerging nations may take their place alongside historical nations as holders of the right of self-determination.

Not all nations fall neatly into one category or the other. There are a number of intermediate cases. Many Aboriginal peoples that once constituted historical nations were fragmented and dispersed during the nineteenth century, under the impact of colonialism and governmental policies, so that their sense of common identity was weakened and their internal political ties impaired. In our view, there is a pressing need for nations of this kind to reconstitute themselves as modern political units. Only in this way can they act effectively to protect and develop their distinctive languages, cultures and traditions.



This process of reconstitution must be an open and inclusive one that does not shut out people by reference to overly restrictive or irrelevant criteria. An Aboriginal group that restricts its membership on an unprincipled or arbitrary basis cannot qualify for the right of self-determination. (Citizenship in Aboriginal nations is discussed later in this chapter.)

The second element in our definition relates to the size and overall capacity of a group. For a body of Aboriginal people to constitute a nation, it must be large enough to assume the powers and responsibilities that potentially flow from the right of self-determination. This right enables an Aboriginal people to opt to govern itself as an autonomous unit within the Canadian federation, with an extensive range of powers. Generally, the right cannot be vested in small local communities that are incapable of exercising the powers and fulfilling the responsibilities of an autonomous governmental unit. Ordinarily, an Aboriginal nation should comprise at least several thousand people, given the range of modern governmental responsibilities and the need to supply equivalent levels of services and to co-ordinate policies with other governments. Nevertheless, this criterion must be applied in a manner that takes account of the differing situations of Aboriginal peoples. For example, some Aboriginal nations, such as the Huron and the Sarcee, are centred in a single community or band and clearly do not have to join with other nations to exercise their right of self-determination. Other historical Aboriginal nations are dispersed over large areas, sometimes spanning several provinces, which makes reunification of the entire nation difficult, at least in the immediate future.

Local communities within an Aboriginal nation have to join together to exercise the right of self-determination. This process need not result in a melting pot. To the contrary, it would be natural for a reconstituted Aboriginal nation to adopt a federal style of constitution that ensures that a considerable measure of authority rests with local communities.

The third element in our definition relates to territorial predominance. Under this criterion, to hold a right of self-determination an Aboriginal group must constitute a majority of the permanent population in a certain territory or collection of territories. A group must have a geographical base. In using this term, we do not imply that the Aboriginal group must have exclusive or special land rights in the territory or territories in question; it is sufficient if the Aboriginal group constitutes a majority of the permanent population. The right of self-determination does not vest in a group whose entire membership is scattered as a minority throughout the general population and as such lacks any geographical base of its own. However, the fact that many or even most members of an Aboriginal nation are dispersed in urban settings does not mean that the nation as a whole lacks a right of self-determination. So long as the nation has a geographical base, it can exercise its right in a way that includes the entire membership of the nation. For example, the fact that many Métis people live in urban



settings does not deprive the Métis Nation of its right of self-determination, because the nation has geographical bases where it is the predominant population.

By contrast, a group of Aboriginal people living dispersed in Toronto or Vancouver does not possess its own right of self-determination, because the group does not constitute the majority population there. Of course, many Aboriginal individuals living in urban settings are members of Aboriginal nations that have their own geographical bases and rights of self-determination. For example, many Aboriginal people living in Halifax belong to the Mi'kmaq Nation, which has a geographical base and qualifies for the right of self-determination. If those individuals are recognized members of the Mi'kmaq Nation, they can participate in the nation's exercise of its right of self-determination. Unaffiliated Aboriginal people living in Halifax, however, do not have a right of self-determination of their own.

It is not necessary for an Aboriginal nation to live on a single contiguous territory to qualify for the right of self-determination. A geographical base may consist of a number of distinct territories, in each of which the members of the Aboriginal nation form a majority of the population. In cases where an Aboriginal nation is composed of a number of local communities in separate locations, those communities normally have to join together to exercise their right of self-determination as a national unit.

---

## RECOMMENDATION

### The Commission recommends that

Government	2.3.2
Recognition of Self-Determination	All governments in Canada recognize that Aboriginal peoples are nations vested with the right of self-determination.

---

Our definition of nation is a flexible one that can apply to a wide range of cases. These include

- a First Nation people with a common historical heritage living on a single territorial base;
- a First Nation people with a common historical heritage living on several distinct territories, whether within a single province or one of the northern territories or spread over several provinces or northern territories;
- a group composed of all or most First Nations communities in a single region, northern territory or province;
- a group comprising First Nations communities belonging to a particular treaty group;

- a group composed of all or most Inuit communities in a single region, northern territory or province;
- a group comprising all or most Métis communities in a single province or northern territory, or several provinces or northern territories.

This list does not, of course, represent all the possibilities. However, it indicates the large variety of groups that would be capable of constituting a nation for purposes of self-determination. It should also be remembered that a number of distinct Aboriginal nations may exercise their individual rights of self-determination by establishing a confederacy with common governmental institutions.

In practical terms, how many Aboriginal nations do we envisage? While the precise number will vary depending on how Aboriginal peoples decide to organize their affairs, we can establish some rough baselines. At the time of the first European contact, there were between 50 and 60 Aboriginal nations inhabiting the territories now making up Canada. Currently, the number of historically based nations is somewhat higher, perhaps as high as 80. The figure of 80 represents the likely upper limit for Aboriginal groups capable of exercising an autonomous right of self-determination. If Aboriginal peoples coalesce on regional, provincial or interprovincial lines, the number of self-determining entities will be somewhat less. These figures should be compared with the total number of local Aboriginal communities in Canada – approximately a thousand.

A further observation can be made. Although historical Aboriginal nations that span several provinces and territories may, over time, come together again as unified political entities, in the shorter term it seems likely that many nations will find it convenient to organize themselves within existing provincial and territorial boundaries. There are a number of practical reasons for doing this, such as the community of interest flowing from a common geo-political situation and the difficulty of conducting negotiations simultaneously with two or more provincial governments as well as with the federal government. Nevertheless, in principle there is no reason why provincial or territorial boundaries should hinder reunification of Aboriginal nations. Indeed, over time transprovincial linkages will be necessary if certain historical groups, such as the Mohawk Nation and the Mi'kmaq Nation, are to reconstitute themselves as contemporary governmental units.

In our view, an Aboriginal nation cannot be identified in a mechanical fashion by reference to a detailed set of objective criteria. The concept has a strong psycho-social component, which consists of a people's own sense of itself, its origins and future development. While historical and cultural factors, such as a common language, customs and political consciousness, will play a strong role in most cases, they will not necessarily take precedence over a people's sense of where their future lies and the advantages of joining with others in a common enterprise. Aboriginal nations, like other nations, have evolved and changed in the past; they will continue to evolve in the future.

## CONCLUSIONS

4. The Commission concludes that the right of self-determination is vested in Aboriginal nations rather than small local communities. By Aboriginal nation we mean a sizeable body of Aboriginal people with a shared sense of national identity that constitutes the predominant population in a certain territory or group of territories. Currently, there are between 60 and 80 historically based nations in Canada, compared with a thousand or so local Aboriginal communities.

5. The more specific attributes of an Aboriginal nation are that

- the nation has a collective sense of national identity that is evinced in a common history, language, culture, traditions, political consciousness, laws, governmental structures, spirituality, ancestry and homeland;
- it is of sufficient size and capacity to enable it to assume and exercise powers and responsibilities flowing from the right of self-determination in an effective manner; and
- it constitutes a majority of the permanent population of a certain territory or collection of territories and, in the future, will operate from a defined territorial base.

Thus far, we have focused on the attributes an Aboriginal group must have to hold a right of self-determination. We turn now to a closely related matter: the process by which an Aboriginal group is identified for purposes of exercising that right.

### Identifying Aboriginal nations

Aboriginal peoples are entitled to identify their own national units for purposes of exercising the right of self-determination. Given the variety of ways in which Aboriginal nations may be configured and the strong subjective element, any self-identification initiative must necessarily come from the people actually concerned.

For a group to hold the right of self-determination, it is not necessary for it to be recognized by the federal or provincial governments. This conclusion flows from the basic rationale of self-determination, which relates to a nation's power to control its own political destiny and establish its own governmental arrangements. If, for example, an Aboriginal nation had to be recognized officially by the federal government in order to exercise the right of self-determination, the right could be frustrated simply by denying that recognition.

Nevertheless, this rationale needs to be tempered by certain practical considerations. Unless the federal and provincial governments are prepared to acknowledge the existence of a certain Aboriginal nation and to co-operate in establishing a process for implementing the nation's right of self-determination,

it will be difficult for that nation to exercise its right in a full and effective manner. Any proper process for implementing the right of self-determination must strike a balance between recognition and the principles of self-determination.

In many cases, when a group identifies itself as an Aboriginal nation entitled to self-determination, this act of self-identification will correspond to widespread public perceptions and existing government practice and the point will not be contested. However, in other instances, disputes will arise regarding whether the group's own determination is correct. Three types of disputes may arise: identity, representation and membership. In practice the distinctions between these types are often blurred, because many disputes have multiple aspects.

An identity dispute concerns whether a certain collection of people actually constitutes an Aboriginal nation vested with a right of self-determination. The point in dispute may be whether the group is actually Aboriginal or whether it satisfies the criteria of nationhood already described (sense of identity, size and territorial predominance).

By contrast, a representation dispute concerns which of two or more rival bodies or organizations is entitled to represent a certain Aboriginal nation (or one of its member communities) in processes implementing the right of self-determination. Representation disputes occur where a certain body within a group purports to speak for the entire group but this claim is disputed by another body, which either claims to be the group's true representative or questions the other body's capacity to speak for the whole group. Sometimes disputes of this kind involve the opposing claims of elected and traditional governing bodies; in other cases, they arise from familial or political splits within the group.

Finally, a membership dispute concerns whether a certain Aboriginal nation is properly configured to exercise the right of self-determination or whether its status is impaired by serious flaws in its membership rules and practices. A First Nation is composed of a number of local communities, whose membership is governed by rules laid down in the *Indian Act*. A large group of non-status individuals living in the vicinity might argue that they form part of the larger national unit even if they do not qualify under the local membership rules. They might claim that they have been unfairly excluded from the group exercising the right of self-determination. Since an Aboriginal nation must be constituted in an inclusive manner to qualify for the right of self-determination, a large-scale membership dispute of this kind could be very significant.

We consider it undesirable for the federal government to deal with these matters on an ad hoc basis, without full disclosure of the principles and policies applied, the factors taken into account, and the objectives sought. The existing process gives too much scope for political discretion and too little scope for the kind of principled consideration that should guide implementation of the right of self-determination.



## CONCLUSION

6. The Commission concludes that Aboriginal peoples are entitled to identify their own national units for purposes of exercising the right of self-determination. For an Aboriginal nation to hold the right of self-determination, it does not have to be recognized as such by the federal government or by provincial governments. Nevertheless, as a practical matter, unless other Canadian governments are prepared to acknowledge the existence of Aboriginal nations and to negotiate with them, such nations may find it difficult to exercise their rights effectively. Therefore, in practice there is a need for the federal and provincial governments actively to acknowledge the existence of the various Aboriginal nations in Canada and to engage in serious negotiations designed to implement their rights of self-determination.

## RECOMMENDATION

The Commission recommends that

### Identifying Nations 2.3.3

The federal government put in place a neutral and transparent process for identifying Aboriginal groups entitled to exercise the right of self-determination as nations, a process that uses the following specific attributes of nationhood:

- (a) The nation has a collective sense of national identity that is evinced in a common history, language, culture, traditions, political consciousness, laws, governmental structures, spirituality, ancestry and homeland.
- (b) The nation is of sufficient size and capacity to enable it to assume and exercise powers and responsibilities flowing from the right of self-determination in an effective manner.
- (c) The nation constitutes a majority of the permanent population of a certain territory or collection of territories and, in the future, operates from a defined territorial base.

We discuss this recommendation in greater detail later in this chapter.

## 2.3 Self-Government

The right of self-determination is the basis in international law for Aboriginal initiatives in the area of governance. However, it is not the only possible basis

for such initiatives. We consider that, as a matter of existing Canadian constitutional law, Aboriginal peoples in Canada have the inherent right to govern themselves. This legal right arises from the original status of Aboriginal peoples as independent and sovereign nations in the territories they occupied. This status was recognized and given effect in the numerous treaties, alliances and other relations negotiated with the French and British Crowns. This extensive practice gave rise to a body of customary law that was common to the parties and eventually became part of the general law of Canada.

In 1982, the inherent right of Aboriginal self-government was recognized and affirmed in section 35(1) of the *Constitution Act, 1982* as an Aboriginal and treaty-protected right. As a result, it is now entrenched in the Canadian constitution. Aboriginal peoples exercising this right constitute one of three distinct orders of government in Canada: Aboriginal, federal and provincial. The sphere of inherent Aboriginal jurisdiction under section 35(1) comprises all matters relating to the good government and welfare of Aboriginal peoples and their territories. This sphere of inherent jurisdiction includes both a core, where an Aboriginal nation may act at its own initiative, and a periphery, where action may be taken only after a treaty or agreement with the Crown has been concluded.

The constitutional right of self-government does not replace the right of self-determination or take precedence over it. Section 35(1) merely recognizes and affirms a pre-existing right. The constitutional right is available to any Aboriginal people who wish to take advantage of it, in addition to or in exercise of the right of self-determination. Moreover, as a matter of basic treaty understandings and broad political principle, the constitutional right does not affect the special relationship between treaty nations and the Crown. The constitutional right is simply an additional tool available to treaty nations that find it useful in advancing toward greater autonomy. It does not detract from other rights they hold on different grounds.

The following discussion examines

- the legal roots of the right of self-government in the doctrine of Aboriginal rights;
- the contributions of Aboriginal nations to the historical genesis of the Canadian constitution;
- the recognition of Aboriginal and treaty rights in the *Constitution Act, 1982*;
- the entrenchment of the right of self-government in the 1982 act;
- the scope of the constitutional right;
- the application of the *Canadian Charter of Rights and Freedoms*;
- the central role of the Aboriginal nation in implementing the right of self-government;
- the question of citizenship in Aboriginal nations; and
- the three orders of government in Canada.

This segment of our report draws upon the preliminary analysis presented in our discussion paper, *Partners in Confederation: Aboriginal Peoples, Self-Government, and the Constitution*, and in *The Right of Aboriginal Self-Government and the Constitution: A Commentary*.<sup>117</sup> We have revised our discussion with the help of the many useful comments, suggestions and criticisms that followed publication of those documents.<sup>118</sup> The following discussion is an expanded approach to the subject; in some respects, it follows the analysis developed in *Partners in Confederation*, but in other respects it represents a fresh treatment of the subject.

### The common law doctrine of Aboriginal rights and the inherent right of self-government

In about 1802, a young Quebec lad by the name of William Connolly left his home near Montreal and went west to seek his fortune in the fur trade with the North-West Company.<sup>119</sup> A year or so later, William married a young woman of the Cree Nation, Suzanne by name. Suzanne had an interesting background. She was born of a Cree mother and a French-Canadian father and was the step-daughter of a Cree chief at Cumberland House, located west of Lake Winnipeg.<sup>120</sup> The union between William and Suzanne was formed under Cree law by mutual consent, with a gift probably given to Suzanne's stepfather. It was never solemnized by a priest or minister. Marriages of this kind were common in the fur trade during that era.

William and Suzanne lived happily together for nearly 30 years and had six children, one of whom later became Lady Amelia Douglas, the wife of the first governor of British Columbia. William Connolly prospered in the fur trade. He was described by a contemporary as "a veritable *bon garçon*, and an Emeralder of the first order." When the North-West Company merged with the Hudson's Bay Company, he continued on as a chief trader and was later promoted to the position of chief factor.

In 1831, William left the western fur trade and returned to the Montreal area with Suzanne and several of their children. Not long after, however, William decided to treat his first marriage as invalid and he married his well-to-do second cousin, Julia Woolrich, in a Catholic ceremony. Suzanne eventually returned west with her younger children and spent her final years living in the Grey Nuns convent at St. Boniface, Manitoba, where she was supported by William and later by Julia. When William died in the late 1840s, he willed all his property to Julia and their two children, cutting Suzanne and her children out of the estate.

Several years after Suzanne's death in 1862, her eldest son, John Connolly, sued Julia Woolrich for a share of his father's estate. This famous case, *Connolly v. Woolrich*, was fought through the courts of Quebec and was eventually appealed to the privy council in Britain before being settled out of court.<sup>121</sup> The judgement

delivered in the case sheds a remarkable light on the constitutional status of Aboriginal nations and their relations with incoming French and English settlers.

In support of his claim, John Connolly argued that the marriage between his mother and William Connolly was valid under Cree law and that the couple had been in 'community of property', so that each partner to the marriage was entitled to one-half of their jointly owned property. When William died, only his half-share of the property could be left to Julia, with the other half passing automatically to Suzanne as his lawful wife. On Suzanne's death, her children would be entitled to inherit her share of the estate, now in the hands of Julia.

The initial question for the Quebec courts was whether the Cree marriage between Suzanne and William was valid. The lawyer for Julia Woolrich argued that it was not valid. He maintained that English common law was in force in the northwest in 1803 and that the union between Suzanne and William did not meet its requirements. Moreover, he said, in an argument that catered to the worst prejudices of the times, the marriage customs of so-called uncivilized and pagan nations could not be recognized by the court as validating a marriage even between two Aboriginal people, much less between an Aboriginal and a non-Aboriginal person.

The Quebec Superior Court rejected Julia Woolrich's arguments. It held that the Cree marriage between Suzanne and William was valid and that their eldest son was entitled to his rightful share of the estate. This decision was maintained on appeal to the Quebec Court of Queen's Bench.

In his judgement, Justice Monk of the Superior Court stated that he was prepared to assume, for the sake of argument, that the first European traders to inhabit the northwest brought with them their own laws as their birthright.<sup>122</sup> Nevertheless, the region was already occupied by "numerous and powerful tribes of Indians; by aboriginal nations, who had been in possession of these countries for ages". Assuming that French or English law had been introduced in the area at some point, "will it be contended that the territorial rights, political organization, such as it was, or the laws and usages of the Indian tribes, were abrogated; that they ceased to exist, when these two European nations began to trade with the aboriginal occupants?" Answering his own question in the negative, Justice Monk wrote: "In my opinion, it is beyond controversy that they did not, that so far from being abolished, they were left in full force, and were not even modified in the slightest degree, in regard to the civil rights of the natives."<sup>123</sup>

Justice Monk supported this conclusion by quoting at length from *Worcester v. Georgia*,<sup>124</sup> a landmark case decided in 1832 by the United States Supreme Court under Chief Justice Marshall. Justice Marshall, describing the policy of the British Crown in America before the American Revolution, states:

Certain it is, that our history furnishes no example, from the first settlement of our country, *of any attempt on the part of the Crown to*



*interfere with the internal affairs of the Indians, farther than to keep out the agents of foreign powers, who, as traders or otherwise, might seduce them into foreign alliances. The king purchased their lands when they were willing to sell, at a price they were willing to take; but never coerced a surrender of them. He also purchased their alliance and dependence by subsidies; but never intruded into the interior of their affairs, or interfered with their self-government, so far as respected themselves only.* [emphasis supplied by Justice Monk]<sup>125</sup>

According to this passage, the British Crown did not interfere with the domestic affairs of its Indian allies and dependencies, so that they remained self-governing in internal matters. Adopting this outlook, Justice Monk concluded that he had no hesitation in holding that “the Indian political and territorial right, laws, and usages remained in full force” in the northwest at the relevant time.<sup>126</sup> This decision portrays Aboriginal peoples as autonomous nations living within the protection of the Crown but retaining their territorial rights, political organizations and common laws.

A number of lessons can be drawn from *Connolly v. Woolrich*. First, the sources of law and authority in Canada are more diverse than is sometimes assumed. They include the common laws and political systems of Aboriginal nations in addition to the standard range of Euro-Canadian sources.

Second, in earlier times, the history of Canada often featured close and relatively harmonious relations between Aboriginal peoples and newcomers. The fur trade, which played an important role in the economy of early Canada, was based on long-standing alliances between European fur traders and Aboriginal hunters and traders. At the personal level, these alliances resulted in people of mixed origins, who sometimes were assimilated into existing groups but in other cases coalesced into distinct nations and communities, as with the Métis of Red River.

*Connolly v. Woolrich* demonstrates that newcomers have sometimes found it convenient to forget their early alliances and pacts with Aboriginal peoples and to construct communities that excluded them and suppressed any local roots. Despite these efforts, however, the courts have periodically upheld the original relationship between newcomers and Aboriginal peoples and enforced the rights it embraced. Among these was the right of Aboriginal peoples to conduct their affairs under their own laws, within a larger constitutional framework linking them with the Crown.<sup>127</sup>

The decision in *Connolly v. Woolrich* stands in contrast, then, to the common impression that Aboriginal peoples do not have any general right to govern themselves. It is often thought that all governmental authority in Canada flows from the Crown to Parliament and the provincial legislatures, as provided in the constitution acts – the basic enactments that form the core of our writ-

ten constitution. According to this view, since the constitution acts do not explicitly recognize the existence of Aboriginal governments, the only governmental powers held by Aboriginal peoples are those delegated to them by Parliament or the provincial legislatures, under such statutes as the *Indian Act*<sup>128</sup> and the *Alberta Metis Settlements Act*.<sup>129</sup>

This outlook assumes that all law is found in statutes or other written legal instruments. Under this view, if a right has not been enshrined in such a document, it is not a legal right. At best, it is regarded as only a moral or political right, which does not have legal status and so cannot be enforced in the ordinary courts. Since the constitution acts do not explicitly acknowledge an Aboriginal right of self-government, such a right does not exist as a matter of Canadian law.

However, this view overlooks important features of our legal system. The laws of Canada spring from a great variety of sources, both written and unwritten, statutory and customary. It has long been recognized, for example, that the written constitution is based on fundamental unwritten principles, which govern its status and interpretation.<sup>130</sup> In Quebec, the general laws governing the private affairs of citizens trace their origins in large part to a body of French customary law, the *Coûtume de Paris*, which was imported to Canada in the 1600s and embodied in the *Civil Code of Lower Canada* in 1866.<sup>131</sup> In the other provinces, the foundation of the general private law system is English common law, a body of unwritten law administered by the courts, with its roots in the Middle Ages.<sup>132</sup> English common law has never been reduced to statutory form, except in partial and fragmentary ways. Over the years, it has become a supple legal instrument, capable of being adapted by the courts to suit changing circumstances and social conditions.

Given the multiple sources of law and rights in Canada, it is no surprise that Canadian courts have recognized the existence of a special body of 'Aboriginal rights'. These are not based on written instruments such as statutes, but on unwritten sources such as long-standing custom and practice. In the *Sparrow* case, for example, the Supreme Court of Canada recognized the Aboriginal fishing rights of the Musqueam people on the basis of evidence "that the Musqueam have lived in the area as an organized society long before the coming of European settlers, and that the taking of salmon was an integral part of their lives and remains so to this day."<sup>133</sup> The court went on to hold that government regulations governing the Aboriginal fishing right were incapable of delineating the content and scope of the right.<sup>134</sup>

Aboriginal rights include rights to land, rights to hunt and fish, special linguistic, cultural and religious rights, and rights held under customary systems of Aboriginal law. Also included is the right of self-government. This broad viewpoint is reflected in the words of John Amagoalik, speaking for the Inuit Committee on National Issues in 1983:

Our position is that aboriginal rights, aboriginal title to land, water and sea ice flow from aboriginal rights; and all rights to practise our customs and traditions, to retain and develop our languages and cultures, and the rights to self-government, all these things flow from the fact that we have aboriginal rights....In our view, aboriginal rights can also be seen as human rights, because these are the things that we need to continue to survive as distinct peoples in Canada.

This point was echoed by Clem Chartier, speaking on behalf of the Métis National Council:

What we feel is that aboriginal title or aboriginal right is the right to collective ownership of land, water, resources, both renewable and non-renewable. It is a right to self-government, a right to govern yourselves with your own institutions....<sup>135</sup>

A similar view underlies a resolution passed by the Quebec National Assembly in 1985. This recognizes the existing Aboriginal rights of the indigenous nations of Quebec. It also urges the government of Quebec to conclude agreements with indigenous nations guaranteeing them

- (a) the right to self-government within Quebec;
- (b) the right to their own language, culture and traditions;
- (c) the right to own and control land;
- (d) the right to hunt, fish, trap, harvest and participate in wildlife management; and
- (e) the right to participate in, and benefit from, the economic development of Quebec... [translation] <sup>136</sup>

The doctrine of Aboriginal rights is not a modern innovation, invented by courts to remedy injustices perpetrated in the past. As seen in Volume 1 of this report, the doctrine was reflected in the numerous treaties of peace and friendship concluded in the seventeenth and eighteenth centuries between Aboriginal peoples and the French and British Crowns. Aboriginal rights are also apparent in the *Royal Proclamation of 1763* and other instruments of the same period, and in the treaties signed in Ontario, the west, and the northwest during the late nineteenth and early twentieth century. These rights are also considered in the many statutes dealing with Aboriginal matters from earliest times and in a series of judicial decisions extending over nearly two centuries. As such, the doctrine of Aboriginal rights is one of the most ancient and enduring doctrines of Canadian law.

The principles behind the decision in *Connolly v. Woolrich* form the core of the modern Canadian law of Aboriginal rights.<sup>137</sup> This body of law provides the basic constitutional context for relations between Aboriginal peoples and the Crown and oversees the interaction between general Canadian systems of law and government and Aboriginal laws, government institutions and territories.<sup>138</sup>

In a series of landmark decisions delivered over the past several decades, the Supreme Court of Canada has upheld the view that Aboriginal rights exist under Canadian law and are entitled to judicial recognition throughout Canada (see Volume 1, Chapter 6).<sup>139</sup> As Justice Judson stated in the *Calder* case,

[The] fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means....<sup>140</sup>

Speaking for a unanimous Supreme Court bench in *Roberts v. Canada* (1989), Justice Bertha Wilson held that the law of Aboriginal title is federal common law, that is, a body of unwritten law operating within the federal constitutional sphere.<sup>141</sup> This law is presumptively uniform across Canada. As such, it can be described as part of the common law of Canada.

In speaking of federal common law in this context, we are not referring to English common law as applied in various parts of Canada outside Quebec. Neither do we intend to draw a contrast with the civil law system of Quebec. Rather, the phrase 'federal common law' describes a body of basic unwritten law that is common to the whole of Canada and extends in principle to all jurisdictions, whether these are governed in other spheres by English common law, French civil law or Aboriginal customary law.

The doctrine of Aboriginal rights is common law in the sense that it is not the product of statutory or constitutional provisions and does not depend on such provisions for its legal force.<sup>142</sup> Rather, it is based on the original rights of Aboriginal nations as these were recognized in the custom generated by relations between these nations and incoming French and English settlers since the seventeenth century. This body of fundamental law provides a legal bridge between Aboriginal nations and the broader Canadian community. It oversees the interaction between their respective legal and governmental systems, permitting them to operate harmoniously, each within its proper sphere. In that sense it forms a body of inter-societal law. Moreover, the doctrine of Aboriginal rights is neither entirely Aboriginal nor entirely European in origin. It draws upon the practices and conceptions of all parties to the relationship as these were modified and adapted in the course of contact. The doctrine not only forms a bridge between different societies, it is a bridge constructed from both sides.

In recognizing the existence of a common law of Aboriginal rights, the contemporary Supreme Court of Canada has tacitly confirmed the views expressed in 1887 by Justice Strong of the Supreme Court in the *St. Catharines* case, where he stated:

It thus appears, that in the United States a traditional policy, derived from colonial times, relative to the Indians and their lands has ripened into well established rules of law....Then, if this is so as regards Indian lands in the United States...how is it possible to sup-



pose that the law can, or rather could have been, at the date of confederation, in a state any less favourable to the Indians whose lands were situated within the dominion of the British Crown, the original author of this beneficent doctrine so carefully adhered to in the United States from the days of the colonial governments? Therefore, when we consider that with reference to Canada the uniform practice has always been to recognize the Indian title as one which could only be dealt with by surrender to the Crown, I maintain that if there had been an entire absence of any written legislative act ordaining this rule as an express positive law, we ought, just as the United States courts have done, to hold that it nevertheless existed as a rule of the unwritten common law, which the courts were bound to enforce as such...<sup>143</sup>

In our view, the common law doctrine of Aboriginal rights includes the right of Aboriginal peoples to govern themselves as autonomous nations within Canada. Although the Supreme Court of Canada has not yet ruled directly on the point, some indication of its thinking can be seen in *R. v. Sioui* (1990), where Justice Lamer delivered the unanimous judgement of a full bench of nine judges. Justice Lamer quoted a passage from *Worcester v. Georgia* (1832) in which the United States Supreme Court summarized British attitudes to Indigenous peoples of North America in the mid-1700s:

Such was the policy of Great Britain towards the Indian nations inhabiting the territory from which she excluded all other Europeans; such her claims, and such her practical exposition of the charters she had granted; *she considered them as nations capable of maintaining the relations of peace and war; of governing themselves, under her protection; and she made treaties with them, the obligation of which she acknowledged.* [emphasis supplied by Justice Lamer]

Justice Lamer went on to comment that Great Britain maintained a similar policy after the fall of New France and the expansion of British territorial claims:

The British Crown recognized that the Indians had certain ownership rights over their land, it sought to establish trade with them which would rise above the level of exploitation and give them a fair return. *It also allowed them autonomy in their internal affairs, intervening in this area as little as possible.* [emphasis added]<sup>144</sup>

To summarize, under the common law doctrine of Aboriginal rights, Aboriginal peoples have an inherent right to govern themselves within Canada. This right is inherent in that it originates from the collective lives and traditions of these peoples themselves rather than from the Crown or Parliament.

## CONCLUSION

7. The Commission thus concludes that the right of self-determination is the fundamental starting point for Aboriginal initiatives in the area of governance. However, it is not the only possible basis for such initiatives. In addition, Aboriginal peoples possess the inherent right of self-government within Canada as a matter of Canadian constitutional law. This right is inherent in the sense that it finds its ultimate origins in the collective lives and traditions of Aboriginal peoples themselves rather than the Crown or Parliament. More specifically, it stems from the original status of Aboriginal peoples as independent and sovereign nations in the territories they occupied, as this status was recognized and given effect in the numerous treaties, alliances and other relations maintained with the incoming French and British Crowns. This extensive practice gave rise to a body of inter-societal customary law that was common to the parties and eventually became part of the law of Canada.

### The process of constitution building

The constitution of Canada has a complex internal structure that bears the imprint of a wide range of historical processes and events. The process of building the Canadian federation was not restricted to the pact struck in the 1860s between the French-speaking and English-speaking representatives of Lower Canada, Upper Canada, Nova Scotia and New Brunswick and to the negotiations bringing in the other provinces at later stages. The Canadian federation also finds its roots in the ancient annals of treaties and alliances between the Aboriginal peoples of North America and the Crown.

The modern state of Canada emerged in part from a multi-faceted historical process involving extensive relations among various bodies of Aboriginal people and incoming French and British settlers. These relations were reflected in a wide variety of formal legal instruments, including treaties, statutes and Crown instruments such as the *Royal Proclamation of 1763*. The resulting body of practice eventually gave rise to a unique body of inter-societal common law that spanned the gap between the societies in question and provided the basic underpinning for ongoing relations between them.

Over time and by a variety of methods, Aboriginal peoples became part of the emerging federation of Canada while retaining their rights to their laws, lands, political structures and internal autonomy as a matter of Canadian common law.

As we saw in Volume 1, this process was not fully consensual (see Chapter 3 and Chapter 6). It was marred by elements of coercion, misrepresentation and outright fraud. It was often characterized by broken promises, widespread acts

of dispossession and a blatant disregard for established rights. Nevertheless, it is also true that the current constitution of Canada has evolved in part from the original treaties and other relations that First Peoples held (and continue to hold) with the Crown and the rights that flow from those relations.

These treaties form a fundamental part of the constitution and for many Aboriginal peoples, play a role similar to that played by the *Constitution Act, 1867* (formerly the *British North American Act*) in relation to the provinces. The terms of the Canadian federation are found not only in formal constitutional documents governing relations between the federal and provincial governments but also in treaties and other instruments establishing the basic links between Aboriginal peoples and the Crown. In brief, 'treaty federalism' is an integral part of the Canadian constitution.

In interpreting those treaties, we should recall the classic observations of Lord Sankey on the nature of the 1867 act:

Inasmuch as the Act [of 1867] embodies a compromise under which the original Provinces agreed to federate, it is important to keep in mind that the preservation of the rights of minorities was a condition on which such minorities entered into the federation, and the foundation upon which the whole structure was subsequently erected. The process of interpretation as the years go on ought not to be allowed to dim or to whittle down the provisions of the original contract upon which the federation was founded....<sup>145</sup>

While these remarks are directed specifically at the position of the provinces on entering Confederation, they bear remembering when it comes to the case of First Nations.<sup>146</sup>

A similar approach was taken by the influential Quebec jurist, Justice Thomas-Jean-Jacques Loranger, in 1883. He summed up the matter in a series of propositions, three of which are relevant here:

1. the confederation of the British Provinces was the result of a compact entered into by the provinces and the imperial Parliament, which, in enacting the British North America Act, simply ratified it;
2. the provinces entered into the federal union, with their corporate identity, former constitutions, and all their legislative powers, part of which they ceded to the federal Parliament, to exercise them in their common interest and for purposes of general utility, keeping the rest which they left to be exercised by their legislatures, acting in their provincial sphere, according to their former constitutions, under certain modifications of form, established by the federal compact;

3. far from having been conferred upon them by the federal government, the powers of the provinces not ceded to that government are the residue of their old powers, and far from having been created by it, the federal government was the result of their association and of their compact, and was created by them. [translation] <sup>147</sup>

Animating these propositions is a single more fundamental principle, which can be called the principle of continuity.<sup>148</sup> As formulated by Loranger, it states that “a right or a power can no more be taken away from a nation than an individual, except by a law which revokes it or by a voluntary abandonment.” [translation]<sup>149</sup>

While Loranger has in mind the status and rights of the provinces uniting in 1867, the implications of the principle of continuity extend far beyond that context. In particular, the principle supports the view that Aboriginal nations did not lose their inherent rights when they entered into a confederal relationship with the Crown. They retained their ancient constitutions so far as these were consistent with the new relationship.

This broader understanding of the constitution raises a number of issues. First, the process of constitution building has taken place over a very long time. It has ranged from such ancient arrangements as the seventeenth-century Covenant Chain between the Five Nations and the French and British Crowns to the relatively recent entry of Newfoundland in 1949. The federal union in 1867, in which French- and English-speaking peoples joined to form the new country of Canada, was a significant landmark in the process. However, it was only one part of a protracted historical evolution that, in one way or another, had already been proceeding for some time and has continued to the present day.

Constitution building was a varied process. The terms and conditions governing relations between the Crown and the Mi'kmaq Nation or the Huron Nation were different from those applying to the provinces of Nova Scotia, British Columbia or Alberta. For example, under the Treaty of Annapolis Royal, concluded by the Mi'kmaq Nation with the British Crown in 1726, the Crown promised “all Marks of Favour, Protection & Friendship” to the Indians and undertook that they “shall not be Molested in their Person's, Hunting, Fishing and Shooting & Planting on their planting Ground nor in any other Lawfull Occasions, By his Majestys Subjects or their Dependants nor in the Exercise of their Religion”.<sup>150</sup> The links between the Mi'kmaq Nation and the Crown were reaffirmed in the Treaty of Governor's Farm in 1761, where the Crown's representative promised

The Laws will be like a great Hedge about your Rights and properties – if any break this Hedge to hurt and injure you, the heavy weight of the Laws will fall upon them and punish their disobedience.<sup>151</sup>



During the same period, in 1760, the Huron Nation concluded a peace treaty with the British, which received them into the Crown's protection "upon the same terms with the Canadians, being allowed the free Exercise of their Religion, their Customs, and Liberty of trading with the English".<sup>152</sup> In the view of the Supreme Court, this broad provision remains in effect today and permits members of the Huron Nation to carry on certain customary activities free of unwarranted interference.<sup>153</sup>

Recognition of national and regional rights has been a major structuring principle of the constitution from earliest times. This principle of continuity ensured that when a distinct national or regional group became part of Canada, it did not necessarily surrender its special character or lose its distinguishing features, whether these took the form of a distinct language, religion, legal system, culture, educational system or political system. In its most developed form, the principle has enabled certain national groups to determine the dominant legal, linguistic, cultural or political character of an entire territorial unit within Confederation, whether this be a province or an Aboriginal territory. In more modest form, it has preserved certain collective rights of national groups within these territorial units.

As we saw in Volume 1, the *Royal Proclamation of 1763* was the cornerstone of the principle of national continuity, in its recognition of the autonomous status of Indian nations within their territories. The preamble to the Indian provisions of the Proclamation provides as follows:

And whereas it is just and reasonable, and essential to Our Interest and the Security of Our Colonies, that the several Nations or Tribes of Indians, with whom We are connected, and who live under Our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to, or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds....<sup>154</sup>

The *Quebec Act* of 1774 also recognized the principle of national continuity.<sup>155</sup> This act amended the provisions introducing English law into Quebec and restored French law in all matters of "Property and Civil Rights."<sup>156</sup> In so doing, the *Quebec Act* confirmed that it was possible for many different legal systems to coexist within the territories under the protection of the British Crown. This principle would be applied extensively as British influence spread into Africa, India and Southeast Asia.<sup>157</sup>

The recognition of French law in the *Quebec Act* did not impair the recognition of Aboriginal rights in the *Royal Proclamation of 1763*. The *Quebec Act* contained a saving provision ensuring that the restoration of French law would not have harmful effects on "any Right, Title, or Possession derived under any grant, Conveyance, or otherwise howsoever, of or to any Lands within the said

Province".<sup>158</sup> This provision preserved all existing rights to land, no matter how these rights were derived. The act restored to the inhabitants of Quebec their original laws and rights but did not give them priority over the laws and rights of Aboriginal groups.<sup>159</sup>

In their various ways, then, the *Royal Proclamation of 1763* and the *Quebec Act* manifest the principle of continuity, which was further recognized and elaborated as federation continued into the next century. The distinct identity of Quebec was a cornerstone of the *Constitution Act, 1867*, which reversed the earlier attempt to unite Lower and Upper Canada into a single province. The phraseology of the *Quebec Act* was carried forward in a provision giving the provinces the exclusive right to make laws regarding "Property and Civil Rights in the Province". The unique character of the Quebec civil law system was reflected in a clause that allowed the Parliament of Canada to provide uniform laws in all the federating provinces except for Quebec, thus introducing an asymmetrical element into Confederation.<sup>160</sup>

The principle of continuity is further reflected in the provisions in the *Manitoba Act, 1870* dealing with the 'Indian title' of the Métis people.<sup>161</sup> Discussing these provisions, one commentator has concluded:

The contextual background of section 31 [of the *Manitoba Act, 1870*] reveals its true nature as one of the constitutional provisions that formed part of 'the basic compact of Confederation' and places it in the category of provisions that guaranteed rights to minorities in order to obtain consent for joining Confederation. For section 31, a land claims agreement was reached and was entrenched in a Confederation pact, and the rights embodied in it are affirmed by section 35 of the *Constitution Act, 1982* as one of the 'treaties' that formalized relations between the Crown and the inhabitants of the Crown lands when Canada assumed jurisdiction.<sup>162</sup>

Our constitutional law shows diversity, not only in its origins and content but also in its legal character. At various times, it has included such items as treaties (both oral and written) with Aboriginal peoples, royal proclamations, governors' commissions and instructions, acts of the British Parliament, federal statutes and orders in council. In addition to such written sources, our constitutional law also incorporates unwritten principles and rules, which can be described as the common law of the constitution. Some of this law has long been entrenched, in that it could not be changed by an ordinary statute passed by Parliament or a provincial legislature, but only by a more complicated process which, before 1982, involved recourse to the British Parliament. Other important parts of the constitution, however, were not entrenched originally and could be altered by ordinary statute.

Before the enactment of section 35 of the *Constitution Act, 1982*, the courts took the view that Aboriginal treaties could be amended or overridden by federal statute, without the agreement of the Aboriginal parties. This view was consistent with certain British constitutional traditions, under which even such fundamental documents as *Magna Carta* could be repealed by a simple act of Parliament. However, it did not correspond to Aboriginal conceptions of the treaties, which were viewed as sacred pacts, not open to unilateral repeal. As Mistah-wah-sis, one of the leading chiefs, stated at the negotiation of Treaty 6 in 1876:

What we speak of and do now will last as long as the sun shines and the river runs, we are looking forward to our children's children, for we are old and have but few days to live.<sup>163</sup>

This outlook was fostered by Crown negotiators, who often emphasized that the treaties were foundational agreements, establishing or confirming the basic and enduring terms of the relationship between Aboriginal peoples and the Crown. We see this in the observations made by Alexander Morris, Lieutenant Governor of the North West Territories, while negotiating the terms of Treaty 4 at Fort Qu'Appelle in 1874:

I told my friends yesterday that things changed here, that we are here to-day and that in a few years it may be we will not be here, but after us will come our children. The Queen thinks of the children yet unborn. I know that there are some red men as well as white men who think only of to-day and never think of to-morrow. The Queen has to think of what will come long after to-day. Therefore, the promises we have to make to you are not for to-day only but for to-morrow, not only for you but for your children born and unborn, and the promises we make will be carried out as long as the sun shines above and the water flows in the ocean.<sup>164</sup>

Unfortunately, the Crown's memory proved more fragile than the memories of the Aboriginal parties. The treaties were honoured by Canadian governments as much in the breach as in the observance. Moreover, before 1982, Canadian courts upheld federal legislation imposing unilateral restrictions on treaty rights. At times, this judicial approach was tinged with misgiving. For example, in *Regina v. Sikeya* (1964), Justice Johnson of the Northwest Territories Court of Appeal commented ruefully:

It is, I think, clear that the rights given to the Indians by their treaties as they apply to migratory birds have been taken away by this Act and its Regulations. How are we to explain this apparent breach of faith on the part of the Government, for I cannot think it can be described in any other terms? This cannot be described as a minor or insignificant curtailment of these treaty rights, for game birds have

always been a most plentiful, a most reliable and a readily obtainable food in large areas of Canada. I cannot believe that the Government of Canada realized that in implementing the Convention they were at the same time breaching the treaties that they had made with the Indians. It is much more likely that these obligations under the treaties were overlooked – a case of the left hand having forgotten what the right hand had done.<sup>165</sup>

Nevertheless, the judge felt bound to uphold the legislation because there was no law preventing Parliament from overriding treaty rights. As we will see, this situation changed dramatically with the reform of the constitution.

### **A constitutional watershed: the *Constitution Act, 1982***

In 1982, the written constitution of Canada was revised to recognize explicitly the special status and rights of Aboriginal peoples. Section 35 of the *Constitution Act, 1982*, as amended in 1983, provides that existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are recognized and affirmed. The provision includes the First Nations, Inuit and Métis peoples and guarantees the rights equally to men and women. Section 35.1 commits the federal and provincial governments to convening a constitutional conference that includes representatives of the Aboriginal peoples of Canada before any amendment is made to a constitutional provision concerning them.

The complete text of these provisions follows:

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
  - (2) In this Act, “aboriginal peoples of Canada” includes the Indian, Inuit and Métis peoples of Canada.
  - (3) For greater certainty, in subsection (1) “treaty rights” includes rights that now exist by way of land claims agreements or may be so acquired.
  - (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.
- 35.1 The government of Canada and the provincial governments are committed to the principle that, before any amendment is made to Class 24 of section 91 of the “*Constitution Act, 1867*”, to section 25 of this Act or to this Part,
- (a) a constitutional conference that includes in its agenda an item relating to the proposed amendment, composed of the Prime Minister of Canada and the first ministers of the



provinces, will be convened by the Prime Minister of Canada; and

- (b) the Prime Minister of Canada will invite representatives of the aboriginal peoples of Canada to participate in the discussions on that item.

The adoption of section 35(1) marked a watershed in relations between Aboriginal peoples and the Canadian state.<sup>166</sup> As the Supreme Court of Canada noted in its unanimous judgement in the leading case of *R. v. Sparrow*, decided in 1990,

S. 35(1) of the *Constitution Act, 1982*, represents the culmination of a long and difficult struggle in both the political forum and the courts for the constitutional recognition of aboriginal rights. The strong representations of native associations and other groups concerned with the welfare of Canada's aboriginal peoples made the adoption of s. 35(1) possible....<sup>167</sup>

The Supreme Court observed that the new provision provided a strong constitutional foundation for negotiations between Aboriginal peoples and Canadian governments. The section also protected Aboriginal peoples from certain kinds of legislation. Moreover, in the view of the court, the significance of section 35 extended beyond these fundamental effects. Quoting from an article by Noel Lyon, it adopted this view:

The context of 1982 is surely enough to tell us that this is not just a codification of the case law on aboriginal rights that had accumulated by 1982. Section 35 calls for a just settlement for aboriginal peoples. It renounces the old rules of the game under which the Crown established courts of law and denied those courts the authority to question sovereign claims made by the Crown.<sup>168</sup>

The Supreme Court stated that, when the purposes of section 35 were taken into account, it was clear that a "generous, liberal interpretation of the words" was demanded.<sup>169</sup> In its view, there was one general guiding principle for understanding section 35:

The relationship between the Government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.<sup>170</sup>

Applying these considerations, the court held that the section gives constitutional protection to a range of special rights enjoyed by Aboriginal peoples, shielding these rights from the adverse effects of legislation and other governmental acts, except where a rigorous standard of justification can be met. There

are two criteria that an asserted right must meet to gain the protection of section 35(1): first, it must qualify as an Aboriginal or treaty right within the meaning of the provision; and second, it must be an existing right, in that it must not have been extinguished before 1982, when section 35(1) took effect. In discussing these criteria, the court focused on the position of Aboriginal rights rather than treaty rights, which were not at issue in *Sparrow*.

Overall, the court took what might be called a 'living heritage' approach to section 35(1), one that endeavours to strike a balance between affirming the historical rights of Aboriginal peoples and providing a form of contemporary justice. This approach involves three interrelated doctrines: continuity; legislative extinguishment; and evolutionary adaptation.

A doctrine of continuity holds that a right originally held by an Aboriginal group as "an integral part of their distinctive culture"<sup>171</sup> presumptively withstood the imposition of colonial rule and continued to exist in 1982, even though the factual evidence for its survival may be somewhat meagre.<sup>172</sup> The court noted that the nature and scope of an Aboriginal right are not to be determined simply by reference to historical government policies or regulatory schemes, thus rejecting an approach that views the right exclusively through the lens of colonial law and policy.<sup>173</sup>

Under a doctrine of legislative extinguishment, the court affirmed that in cases where an Aboriginal right had been extinguished by legislation before 1982, it would not qualify as an existing right under the section.<sup>174</sup> Nevertheless, the court placed two significant limitations on the operation of this doctrine. First, legislation must manifest a clear and plain intention to extinguish an Aboriginal right before it can have this effect.<sup>175</sup> The court adopted the 'clear and plain' standard as set out by Justice Hall in the *Calder* case rather than a 'tacit extinguishment' approach favoured in other quarters. In particular, the court distanced itself from the view expressed in the *Baker Lake* case that an Aboriginal right was automatically extinguished to the extent that it was inconsistent with a statute.<sup>176</sup> It also set to one side the approach of Justice Judson in *Calder*, which viewed a series of statutes as manifesting "a unity of intention to exercise a sovereignty inconsistent with any conflicting interest, including aboriginal title."

The court placed a second important limitation on the extinguishment doctrine. It held that legislation that merely regulated an Aboriginal right did not extinguish it, even if the regulations were very detailed and extensive and the right was reduced to a very narrow scope.<sup>177</sup> So long as the right survived in some form, however slight, it qualified as an existing right under section 35(1) and received constitutional protection. Moreover, the section would not freeze an Aboriginal right in the regulated form it happened to hold in 1982.<sup>178</sup> Restrictions imposed by existing legislation would be open to challenge under section 35(1) as being inconsistent with the constitutional recognition extended by the provision.

Adopting a doctrine of evolutionary adaptation, the court held that the phrase 'existing Aboriginal rights' must be interpreted flexibly to permit rights to evolve and adapt over time. In particular, said the court, "the word 'existing' suggests that those rights are 'affirmed in a contemporary form rather than in their primeval simplicity and vigour'".<sup>179</sup> As applied to the case under consideration, for example, this doctrine means that the Aboriginal fishing rights of the Musqueam people "may be exercised in a contemporary manner".<sup>180</sup> Further, any legislation limiting Aboriginal rights "must uphold the honour of the Crown and must be in keeping with the *unique contemporary relationship*, grounded in history and policy, between the Crown and Canada's aboriginal peoples".<sup>181</sup>

Overall, then, the Supreme Court held that section 35(1) recognizes Aboriginal rights as the *living heritage* of Aboriginal peoples rather than as strictly historical rights. This approach endeavours to pay due regard to history without being in thrall to it. It anchors itself in the contemporary world and takes as much account of current conditions as it does of past circumstances.

### The inherent right of self-government is entrenched in the constitution

Given the approach identified in *Sparrow*, the basic argument in favour of a constitutional right of self-government is relatively straightforward.<sup>182</sup> At the time of European contact, Aboriginal peoples were sovereign and independent peoples, possessing their own territories, political systems and customary laws. Although colonial rule modified this situation, it did not deprive Aboriginal peoples of their inherent right of self-government, which formed an integral part of their cultures. This right continued to exist, in the absence of clear and plain legislation to the contrary. Although in many cases the right was curtailed and tightly regulated, it was never completely extinguished. As a result, the inherent right of self-government was recognized and affirmed in section 35(1) of the *Constitution Act, 1982* as an existing Aboriginal or treaty-protected right. This constitutional right assumes a contemporary form, one that takes account of the changes that have occurred since contact, the modern needs of Aboriginal peoples, and the existence of a federal system in Canada.

The strength of this approach is that it follows closely the route identified in *Sparrow* and so benefits from the substantial authority this case carries in Canadian law. However, the approach also has some drawbacks. Taken in isolation, it could be viewed as conceding that the existence of the inherent right of self-government in Canada today depends simply on whether the right had been extinguished by Canadian or imperial legislation before 1982. The approach therefore tacitly accepts the possibility of unilateral extinguishment, a possibility that few Aboriginal peoples are prepared to contemplate. For them, the right of self-government is fundamental to their very existence as peoples and

as such is inextinguishable without their free consent. From this perspective, the approach represents the low road to a destination that would better be reached by the high road of principle and fundamental rights.

These considerations lead us to suggest an alternative approach to section 35(1), one that seems consistent with the spirit of the *Sparrow* decision even though it is not clearly articulated there.<sup>183</sup> This approach draws attention to the fact that some of the rights covered by section 35(1) are so closely connected with the basic identity and communal well-being of Aboriginal peoples that it is hard to imagine they could ever have been completely extinguished by unilateral Crown acts. For example, it is difficult to believe that legislation passed before 1982 could have terminated a people's right to speak their own language, to follow their basic way of life or to adhere to their spiritual traditions. In dealing with rights of this kind, our approach argues, we should set a very strict standard for extinguishing legislation, one that would be extremely difficult to satisfy, given the importance of the rights at stake.

In applying the word 'existing' in section 35(1), we should consider not only the terms of any legislation passed before 1982 but also the character and weight of the particular right in question, as a matter of basic human rights and international standards. The strictness of the extinguishment criterion will vary, depending on the gravity of the right at stake and its importance to the identity of the Aboriginal people in question. This last factor deserves particular emphasis. Aboriginal peoples are the descendants of the historical nations of Canada, the first to occupy the land as sovereign peoples and the original stewards of its resources. It is unimaginable that, in their own homelands, Aboriginal peoples should ever be denied Aboriginal and treaty rights that are central to their existence as peoples. This broader approach reinforces the conclusion that the inherent right of self-government still exists for all Aboriginal peoples in Canada and that this right exists notwithstanding the terms of legislation passed before 1982.

From the time that section 35(1) was first enacted, observers have noted that the right of Aboriginal peoples to govern themselves within Canada was potentially one of the rights recognized in the section. As early as 1983, the report of a special House of Commons committee on Indian self-government (the Penner report) observed that the inclusion of Aboriginal and treaty rights in the constitution may have altered the traditional understanding of governmental powers:

If, as many assert, the right to self-government exists as an aboriginal right, there could be a substantial re-ordering of powers. Indian governments may have implicit legislative powers that are now unrecognized.<sup>184</sup>

The Penner report remarked that many Indian witnesses appearing before the committee affirmed that the Aboriginal right of self-government had an existing basis in Canadian law. For example, a representative of the Canadian Indian



Lawyers' Association, Judy Sayers, invoked the *Royal Proclamation of 1763* and the *Constitution Act, 1982* and concluded that "there is in law and history a definite basis for self-determination and self-government."<sup>185</sup> Noting this possibility, the Penner committee recommended that the constitution be amended to recognize explicitly and entrench the right of self-government. Indian governments would then, in the committee's view, clearly form a distinct order of government in Canada, with their jurisdiction defined.<sup>186</sup>

During the following decade, further constitutional reform was actively pursued. Several intensive rounds of constitutional negotiations occurred between Aboriginal peoples and the federal and provincial governments.<sup>187</sup> One major aim was to secure explicit constitutional recognition of the right of self-government. These efforts culminated in the detailed Aboriginal amendments proposed in the Charlottetown Accord of 1992.<sup>188</sup> Despite the complexity of these provisions, one simple clause lay at their core. The draft legal text of 9 October 1992 included the following provision:

35.1 (1) The Aboriginal peoples of Canada have the inherent right of self-government within Canada.

As the wording indicates, this provision does not purport to create a right of self-government or to grant it to Aboriginal peoples. It simply affirms that Aboriginal peoples have this right, a right described as inherent. It seems fair to conclude that the draft provision assumes that the right of self-government was already in existence. The provision was intended merely to confirm the right and give it explicit constitutional status. Although the Charlottetown Accord was never implemented, it bears witness to one important point: all the parties to the accord were prepared to recognize that Aboriginal peoples already possessed the inherent right to govern themselves within Canada.

More recently, this view has been reaffirmed by the government of Canada on numerous occasions. On 4 November 1994 a political accord was signed between the minister of Indian affairs, Ronald A. Irwin, and the Mi'kmaq of Nova Scotia, in which the parties agreed to conduct further negotiations implementing the Mi'kmaqs' inherent right of self-government regarding education. The accord's preamble states:

WHEREAS Canada is prepared to act on the premise that the inherent right of self-government is an existing Aboriginal right within the meaning of section 35 of the Constitution Act of 1982;

AND WHEREAS Canada is engaging in a process of discussion with Aboriginal people of Canada on how best to implement the inherent right of self-government;

AND WHEREAS Canada is prepared to act on the premise that the inherent right of self-government includes jurisdiction in respect of education;

The following month, on 7 December 1994, a framework agreement was concluded between First Nations communities in Manitoba, represented by the Assembly of Manitoba Chiefs, and the Queen represented by the minister of Indian affairs. The thrust of the agreement is to dismantle the operations of the Department of Indian Affairs and Northern Development (DIAND) in Manitoba, restore jurisdiction to First Nations peoples, and recognize First Nations governments. The agreement sets out a number of principles to guide this process, including the following:

5.2 The inherent right of self-government, First Nations' Treaty rights and Aboriginal rights will form the basis for the relationships which will be developed as a result of the process;

5.3 In this process, the Treaty rights of First Nations will be given an interpretation, to be agreed upon by Canada and First Nations, in contemporary terms while giving full recognition to their original spirit and intent;

5.4 First Nations governments in Manitoba and their powers will be consistent with Section 35 of the *Constitution Act, 1982*;

Finally, in August 1995, the federal government issued a policy guide entitled *Aboriginal Self-Government*, which sets out the government's approach to implementing the inherent right of self-government. The policy guide affirms:

The Government of Canada recognizes the inherent right of self-government as an existing Aboriginal right under section 35 of the *Constitution Act, 1982*. It recognizes, as well, that the inherent right may find expression in treaties, and in the context of the Crown's relationship with treaty First Nations. Recognition of the inherent right is based on the view that the Aboriginal peoples of Canada have the right to govern themselves in relation to matters that are internal to their communities, integral to their unique cultures, identities, traditions, languages and institutions, and with respect to their special relationship to their land and their resources.<sup>189</sup>

The policy guide acknowledges that the inherent right of self-government may be enforceable in the courts. However, it affirms a strong preference for negotiation over litigation as the most practical method to implement the inherent right.

These documents show that the federal government recognizes that the inherent right of self-government is entrenched in section 35(1) of the *Constitution Act, 1982* as an Aboriginal and treaty-protected right. As seen earlier, this view is consistent with the unanimous decision of the Supreme Court of Canada in *Siouxi*, which indicates that the right of self-government is an Aboriginal right under the common law of Canada.

Nevertheless, serious arguments have been advanced to the effect that the right of self-government was in fact extinguished before 1982 and as such cannot benefit from the constitutional guarantee in section 35(1). It is important to address these arguments, even if they involve somewhat technical matters that seem far removed from the broad approach recommended earlier.

Four main arguments need to be considered. The first three are comprehensive in nature: they apply to all Aboriginal peoples in Canada, including First Nations, Inuit and Métis peoples. The final argument is narrower and applies only to peoples covered by the *Indian Act*. In the *Delgamuukw* case, a majority of the British Columbia Court of Appeal accepted the first three arguments and held that any inherent powers of Aboriginal governments in British Columbia were extinguished at the latest when the colony joined Confederation in 1871.<sup>190</sup> The case is now on further appeal to the Supreme Court of Canada and is being held in abeyance pending further negotiations between the parties.

Briefly, the first argument maintains that inherent Aboriginal governmental powers were automatically terminated as a matter of British law when the British Crown and Parliament assumed sovereignty over Canadian territory. The second argument is a variation on this view, holding that Aboriginal powers were extinguished when the Crown appointed a governor and set up a local law-making authority, such as an assembly or the governor in council. The third argument maintains that, in any case, Aboriginal powers came to an end when the *Constitution Act, 1867* became applicable to the territory in question. This result is said to flow from the act's comprehensive division of legislative powers between the federal and provincial governments and from the grant of exclusive jurisdiction over Indian affairs to Parliament. The fourth argument holds that federal Indian legislation passed after 1867 effectively wiped out any inherent jurisdiction held by Indian peoples and substituted a form of delegated jurisdiction.

The first two arguments are both ostensibly based on the British doctrine of the sovereignty of Parliament and so can be considered together. In his classic *Introduction to the Study of the Law of the Constitution*, Dicey summarizes this doctrine as follows:

The principle of Parliamentary sovereignty means neither more nor less than this, namely, that Parliament thus defined has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament.

A law may, for our present purpose, be defined as "any rule which will be enforced by the courts." The principle then of Parliamentary sovereignty may, looked at from its positive side, be thus described: Any Act of Parliament or any part of an Act of

Parliament, which makes a new law, or repeals or modifies an existing law, will be obeyed by the courts. The same principle, looked at from its negative side, may be thus stated: There is no person or body of persons who can, under the English constitution, make laws which override or derogate from an Act of Parliament, or which (to express the same thing in other words) will be enforced by the courts in contravention of an Act of Parliament.<sup>191</sup>

The argument then cites the view expressed by the Supreme Court of Canada in the *Sparrow* case:

[While] British policy towards the native population was based on respect for their right to occupy their traditional lands, a proposition to which the Royal Proclamation of 1763 bears witness, there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown....<sup>192</sup>

Taken in combination with the doctrine of parliamentary sovereignty, this view leads necessarily to the conclusion that the sovereignty of the British Parliament (and of local legislatures established under British authority) left no room whatever for Aboriginal jurisdiction, which was automatically extinguished.

In the Commission's view, this argument is not sound. Even if one accepts the premises given, they do not lead to the conclusion that Aboriginal jurisdiction was necessarily terminated. The doctrine of parliamentary sovereignty, as framed by Dicey, involves two related propositions. The first proposition affirms that "Parliament...has, under the English constitution, the right to make or unmake any law whatever". As applied to Aboriginal peoples, this proposition means that once the Crown assumes authority over a certain territory, the British Parliament (or suitably empowered local legislatures) would have the power to repeal or modify indigenous laws and to curtail or abolish Aboriginal jurisdiction. However, it does not follow that Aboriginal laws and jurisdiction would be terminated automatically once the British Parliament assumes authority. It only means that, according to British law, both would now be subject to the paramount authority of the British Parliament. A clear and plain parliamentary act would be required to terminate them. To draw a parallel, under the doctrine of parliamentary sovereignty, the British Parliament has the power to confiscate all private lands in England without compensation. Nevertheless, the fact that Parliament has the power to do this does not mean that private property automatically ceases to exist. Very clear legislation would be needed to produce such a drastic result.

The second proposition framed by Dicey states that "no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament". This proposition means that under British law, once



the Crown assumes authority over a certain Canadian territory, no Aboriginal institution would have the power to override a parliamentary statute applying in the territory (or a law passed by a suitably empowered local legislature). According to this doctrine, an Aboriginal body would not be able to enforce an indigenous law that was inconsistent with a British statute. However, as long as no such inconsistency existed, the indigenous law would remain in force. Furthermore, the capacity of the Aboriginal body to formulate or enforce the laws of the group would not be extinguished but would continue to exist, subject to the paramount power of Parliament.

To summarize, it is a mistake to think that under the doctrine of parliamentary sovereignty the power of an Aboriginal group to formulate and enforce its own laws is automatically terminated once the Crown assumes authority. The doctrine of parliamentary sovereignty maintains simply that the group and its laws are now subordinate to parliamentary power. If Parliament exercises this power to override or amend the indigenous laws in question or to abolish inherent Aboriginal jurisdiction, Crown courts will give effect to this act.<sup>193</sup> However, so long as Parliament does not act in this manner, Aboriginal laws and jurisdiction remain essentially intact.

For example, as seen in the case of *Connolly v. Woolrich*, the fact that the British Crown assumed sovereignty over a certain part of western Canada did not mean that the marriage laws of Aboriginal peoples living there were automatically terminated or that Aboriginal jurisdiction to enforce these laws was superseded. To the contrary, indigenous laws and jurisdiction continued to exist, in the absence of British legislation repealing or modifying them.

So, the simple fact that the British Crown gained control over a certain Canadian territory and established a local legislature there did not mean that inherent Aboriginal jurisdiction was automatically superseded. In the absence of clear and plain legislation to the contrary, indigenous jurisdiction continued to exist under the Crown's protection. As seen earlier, this conclusion is consistent with the wording of the *Royal Proclamation of 1763*, which speaks of "the several Nations or Tribes of Indians, with whom We are connected, and who live under Our Protection". It is also consistent with the unanimous decision of the Supreme Court of Canada in *Sioui*, which affirmed that the British Crown allowed Aboriginal peoples "autonomy in their internal affairs, intervening in this area as little as possible".

These reflections dispose of the first two arguments identified. However, they bring us directly to the third argument. This argument affirms that when the British Parliament passed the *Constitution Act, 1867*, it clearly expressed the intention to abolish any form of inherent Aboriginal jurisdiction in Canada. In other words, not only did Parliament have the power to abolish indigenous jurisdiction, it actually exercised this power in 1867. This argument is based on two related propositions.

The first proposition holds that the *Constitution Act, 1867* divided all governmental powers between the federal and provincial governments, except for a few matters expressly reserved. As the privy council remarked in the *Reference Appeal* (1912):

In 1867 the desire of Canada for a definite Constitution embracing the entire Dominion was embodied in the British North America Act. Now, there can be no doubt that under this organic instrument the powers distributed between the Dominion on the one hand and the provinces on the other hand cover the whole area of self-government within the whole area of Canada. It would be subversive of the entire scheme and policy of the Act to assume that any point of internal self-government was withheld from Canada.<sup>194</sup>

According to this argument, the complete distribution of legislative and executive authority between the federal and provincial governments in 1867 did not leave any room for inherent Aboriginal jurisdiction, which was necessarily extinguished.

The second proposition invokes section 91 of the *Constitution Act, 1867*, which provides that Parliament has “exclusive Legislative Authority” over all the matters listed in the section, including “Indians, and Lands reserved for the Indians” (section 91(24)). According to this argument, the word ‘exclusive’ abolishes any Aboriginal jurisdiction. Section 91(24) indicates that Parliament is the sole governmental authority capable of dealing with Aboriginal peoples. It would be inconsistent with the section’s wording, according to this view, if such an authority resided in both Parliament and Indigenous peoples.

In our opinion, these arguments are not persuasive. They fail to take account of the historical background to the *Constitution Act, 1867* and the purposes the act was designed to serve. The year 1867 was not, of course, the first occasion upon which Canadian governments had been granted comprehensive powers. From early times, local colonial governments had been empowered to legislate for the peace, welfare and good government of the colony (or some variation on this formula), and this grant was understood to confer comprehensive authority within the larger framework of imperial legislation, subject to any specific limitations.<sup>195</sup>

For example, the Royal Commission to the Governor of Nova Scotia in 1749 authorized him to constitute a council and an assembly and together with them to legislate “for the Public peace, welfare & good government of our said province”.<sup>196</sup> The *Royal Proclamation of 1763* contained a similar provision for Quebec, empowering the governor, council and assembly to make laws “for the Publick Peace, Welfare, and Good Government” of the colony.<sup>197</sup> Likewise, the *Constitutional Act, 1791* gave the councils and assemblies of Upper and Lower Canada the power, together with the Crown, to make laws for the peace, welfare and good government of the provinces in question.<sup>198</sup> The same language

is found in the *Union Act, 1840*.<sup>199</sup> These general grants of authority included the power to deal with Aboriginal peoples and their affairs, as is evinced by the many executive acts and statutes concerning Indians and Indian lands in the colonies before 1867.

The *Constitution Act, 1867* did not materially increase the power of Canadian governments to deal with Aboriginal peoples, nor did it alter the status of Aboriginal institutions of government. Its main effect was to transfer powers formerly held by the governments of the provinces to the new federal government, powers that were held to the exclusion of the provinces. This fact explains the wording of section 91, which gives Parliament an exclusive set of powers over a specific list of subject matters, including "Indians, and Lands reserved for the Indians". By the same token, section 92 gives provincial legislatures the exclusive power to make laws regarding certain other matters. The wording of the two sections is reciprocal and designed to eliminate overlap between the federal and provincial authorities.

In our view, the term exclusive in section 91 means exclusive of the provincial legislatures. The term does not address the question of inherent Aboriginal jurisdiction and does not affect it. Before 1867, Aboriginal jurisdiction had coexisted with the old colonial constitutions in force in the provinces; it continued to exist in the new federation of Canada.

A parallel approach to the act of 1867 was taken by Lord Denning in *R. v. Secretary of State*:

Save for that reference in s. 91(24), the 1867 Act was silent on Indian affairs. Nothing was said about the title to property in the 'lands reserved for the Indians', nor to the revenues therefrom, nor to the rights and obligations of the Crown or the Indians thenceforward in regard thereto. But I have no doubt that all concerned regarded the royal proclamation of 1763 as still of binding force. It was an unwritten provision which went without saying. It was binding on the legislatures of the Dominion and the provinces just as if there had been included in the statute a sentence: 'The aboriginal peoples of Canada shall continue to have all their rights and freedoms as recognized by the royal proclamation of 1763'.<sup>200</sup>

The continued existence of Aboriginal political systems is borne out by legislation enacted both before and after the *Constitution Act, 1867*. Consider, for example, the *Indian Lands Act*, passed by the Province of Canada in 1860.<sup>201</sup> Section 4 provides that lands reserved for the use of any tribe or band of Indians cannot be surrendered except on this condition:

Such release or surrender shall be assented to by the Chief, or if more than one Chief, by a majority of the Chiefs of the tribe or band of

Indians, assembled at a meeting or Council of the tribe or band summoned for that purpose *according to their rules*. [emphasis added]

This section apparently presupposes that each tribe or band of Indians retained its internal political structure as determined by the tribe's own rules. The act superimposes a further layer of regulations on these structures but otherwise leaves them intact.

The *Constitution Act, 1867* did not change this position, as we see in the first federal Indian statute passed after Confederation. The *Indian Lands Act* of 1868 contains wording virtually identical to that found in the 1860 act.<sup>202</sup> Section 8 states that no surrender of lands reserved for the use of any tribe, band or body of Indians is valid unless assented to by the chief or chiefs of the group assembled "at a meeting or council of the tribe, band or body summoned for that purpose *according to their rules*". [emphasis added] Similar wording appears in federal Indian legislation until 1951, when the provision changes.<sup>203</sup> Nevertheless, section 2 of the *Indian Act* of 1951 continues to envisage bands with councils and chiefs chosen "according to the custom of the band", and a similar provision appears in the current *Indian Act*. These provisions correctly assume that the internal constitutions of Aboriginal groups survived the passage of the *Constitution Act, 1867*.

Section 129 of the 1867 act gives added support to this conclusion. The section enunciates a broad principle of continuity whereby laws and powers existing before 1867 presumptively remained in force in the new federation. The text states that, except as provided elsewhere in the act, "all *Laws* in force in Canada, Nova Scotia, or New Brunswick at the Union, and all *Courts* of Civil and Criminal Jurisdiction, and all legal Commissions, *Powers, and Authorities*, and all Officers, Judicial, Administrative, and Ministerial" [emphasis added] shall continue to operate, subject nevertheless to be repealed, abolished or amended by Parliament or the provincial legislatures, according to their respective capacities. In our opinion, this language is sufficient to prevent Aboriginal governmental structures, powers and laws from being swept away by the division of powers accomplished by the 1867 act. It leaves these matters in the same state as before 1867, subject to any new legislation passed by Parliament.

Nevertheless, beginning in 1869, Parliament passed a series of measures defining the governmental powers of Indian chiefs and councils and subordinating them to the discretion of federal officials.<sup>204</sup> This legislation provides the basis of the fourth extinguishment argument. This argument applies only to peoples covered by the Indian acts and does not affect the position of Inuit or Métis people. In brief, the argument maintains that federal Indian legislation wiped out any form of inherent jurisdiction in Aboriginal peoples and substituted a restricted form of delegated governmental authority.

We do not find this argument convincing. As discussed in Volume 1, Chapter 9, the basic pattern was established by the *Indian Enfranchisement and Management Act* of 1869, which provides in section 12:



The Chief or Chiefs of any Tribe in Council may frame, subject to confirmation by the Governor in Council, rules and regulations for the following subjects, viz:

1. The care of the public health.
2. The observance of order and decorum at assemblies of the people in General Council or on other occasions.
3. The repression of intemperance and profligacy.
4. The prevention of trespass by cattle.
5. The maintenance of roads, bridges, ditches and fences.
6. The construction of and maintaining in repair of school houses, council houses and other Indian public buildings.
7. The establishment of pounds and the appointment of pound-keepers.<sup>205</sup>

This provision, and others like it, clearly purported to alter the existing governmental structures of Aboriginal groups. It attributed legislative powers to individuals and entities that may not have possessed them previously and confined these powers to a narrow range of subjects. Nevertheless, these restrictive measures did not build upon completely new foundations. They took for granted the existence of Aboriginal groups as distinct political entities and introduced or authorized changes in their internal political structures.

We see an example of this approach in the second paragraph of the section just quoted, which authorizes chiefs in council to frame regulations dealing with order and decorum assemblies of the people in general council, which assumes the continuing existence of assemblies and councils constituted under Indian custom. Another provision in the same act authorizes the governor in council to order that chiefs be elected by the adult male members of the group and hold office for three years, unless dismissed by the governor for bad behaviour. However, this provision is left to be implemented at the governor's discretion. Otherwise, the group's traditional mode of selecting chiefs continues as before. So, while it is true that federal Indian legislation severely disrupted and distorted the political structures of Aboriginal peoples, leaving them with limited powers, in our view the legislation did not evince a clear and plain intention to strip them of all governmental authority.

We conclude, then, that the inherent right of self-government of Aboriginal peoples was still in existence in 1982 when section 35(1) was enacted. As such, it qualifies as an existing right under the section. One great achievement of section 35(1) of the *Constitution Act, 1982* was to deal with the issue of the status of Aboriginal governments in a manner favourable to Aboriginal views. By entrenching Aboriginal and treaty rights in the constitution, section 35(1) ensured that the right of self-government would henceforth enjoy a substantial degree of immunity from federal and provincial legislation, except where the legislation could be justified under a strict constitutional standard.

## CONCLUSIONS

8. The Commission concludes that the inherent right of Aboriginal self-government is recognized and affirmed in section 35(1) of the *Constitution Act, 1982* as an Aboriginal and treaty-protected right. The inherent right is thus entrenched in the Canadian constitution, providing a basis for Aboriginal governments to function as one of three distinct orders of government in Canada.

9. The constitutional right of self-government does not supersede the right of self-determination or take precedence over it. Rather, it is available to Aboriginal peoples who wish to take advantage of it, in addition to their right of self-determination, treaty rights and any other rights that they enjoy now or negotiate in the future. In other words, the constitutional right of self-government is one of a range of voluntary options available to Aboriginal peoples.

### The scope of constitutional self-government

Let us turn now to the question of the precise nature and scope of the Aboriginal right of self-government under section 35. It should be emphasized once again that, in speaking of the right of self-government in this context, we have in mind the particular version of that right now recognized in Canadian constitutional law. We are not referring to the broad right of self-government that is asserted by many Aboriginal peoples on the basis of their treaties or on other historical and political grounds. The precise character of that broader right varies from people to people, as do its dimensions and overall significance. We think that this matter is better addressed by each Aboriginal people in negotiations with the Crown. Here we deal only with the right of self-government that, in our judgment, is recognized in section 35(1) of the *Constitution Act, 1982*.

It follows from what we have already said that the right of self-government is inherent in its source, in the sense that it finds its origins within Aboriginal peoples, as a contemporary manifestation of the powers they originally held as independent and sovereign nations. It does not stem from constitutional grant; that is, it is not a derivative right. The distinction between an inherent and a derivative right is not merely symbolic. It addresses the basic issue of how Canada emerged and what it stands for. According to proponents of the view that the right is derivative, Aboriginal peoples have no rights of government other than those that the written constitution creates or that the federal and provincial governments choose to delegate. By contrast, our approach sees Aboriginal peoples as the bearers of ancient and enduring powers of government that they carried with them as they established relations with the Crown. Under the first theory, Aboriginal governments are newcomers on the constitutional scene, mere neophytes among governments in Canada. Under the second doctrine,

Aboriginal governments give the constitution its deepest and most resilient roots in the Canadian soil.

The Aboriginal right of self-government is recognized by the Canadian legal system, under the constitutional common law of Canada and also under section 35(1). So, while the section 35(1) right is inherent in point of origin, as a matter of current status it is a right held in Canadian law. The implication is that, while Aboriginal peoples have the inherent legal right to govern themselves under section 35(1), this constitutional right is exercisable only within the framework of Canada. Section 35 does not warrant a claim to unlimited governmental powers or to complete sovereignty, such as independent states are commonly thought to possess. As with the federal and provincial governments, Aboriginal governments operate within a sphere of sovereignty defined by the constitution. In short, the Aboriginal right of self-government in section 35(1) involves circumscribed rather than unlimited powers.

Within their sphere of jurisdiction, however, the authority of Aboriginal governments is immune to indiscriminate federal or provincial interference. This conclusion flows from the *Sparrow* decision, where Aboriginal rights and treaty rights were treated as immune to legislative inroads, except where a high constitutional standard could be satisfied. According to this view, Aboriginal governments are not subordinate to the actions of other governments, but neither are they entirely supreme. They occupy an intermediate position. In cases where an Aboriginal law conflicts with a federal law, the Aboriginal law will prevail except where the federal law can be justified under the *Sparrow* standard. This view recognizes a large degree of Aboriginal sovereignty and yet allows for the paramount operation of federal laws in matters of overriding importance to the federal government.

How can the Aboriginal right of self-government in section 35(1) be implemented? Here it is helpful to distinguish between two opposing views. According to the first view, the right of self-government is merely a potential right, which needs to be particularized and adapted to the needs of each Aboriginal people before it can be implemented, a process that requires negotiation and agreement between an Aboriginal people and the Crown. So, under this view, the right cannot be implemented unilaterally by an Aboriginal group. By contrast, according to the second view, the right of self-government is actual rather than potential. As such, it can be implemented immediately to its fullest extent by self-starting Aboriginal initiatives, even in the absence of self-government treaties and agreements.

In our view, neither of these options is entirely satisfactory. To hold that the right of self-government cannot be exercised at all without the agreement of the Crown appears inconsistent with the fact that the right is inherent. To hold that Aboriginal peoples can implement the right to its fullest extent unilaterally reads too much into section 35(1), as seen in the broader context of the constitution as a whole.

We propose a middle path between these two extremes. In our approach, the right of self-government recognized in section 35(1) should be considered organic, in a sense similar to that explained in a First Nations constitutional report:

Self-government is not a machine to be turned on or off. It is an organic process, growing out of the people as a tree grows from the earth, shaped by their circumstances and responsive to their needs. Like a tree growing, it cannot be rushed or twisted to fit a particular mould.<sup>206</sup>

We might add that, like trees growing in a forest, Aboriginal governments coexist with other governments in a complex ecological system. So, while the ancient pine of Aboriginal governance is still rooted in the same soil, from which it derives stability and sustenance, it is now linked in various intricate ways with neighbouring governments.

According to the organic model, Aboriginal peoples constitute one of three orders of government in Canada: Aboriginal, federal and provincial. These exercise authority within distinct but overlapping spheres. The Aboriginal sphere of jurisdiction includes all matters relating to the good government and welfare of Aboriginal peoples and their territories. As noted earlier, this sphere consists of both a core and a periphery. In core areas of jurisdiction, an Aboriginal people is free to implement its inherent right of self-government by self-starting initiatives, without the need for agreements with the federal and provincial governments, although it would be highly advisable for Aboriginal people to negotiate such agreements in the interests of reciprocal recognition and the avoidance of litigation. However, in the periphery, the inherent right of self-government can be exercised only following the conclusion of agreements with the federal and provincial governments.

The core of Aboriginal jurisdiction includes all matters that

- are of vital concern to the life and welfare of a particular Aboriginal people, its culture and identity;
- do not have a major impact on adjacent jurisdictions; and
- are not otherwise the object of transcendent federal or provincial concern.

The periphery makes up the remainder of the sphere of inherent Aboriginal jurisdiction.

Under the organic model, the right of self-government is an inherent right in both the core and the periphery. In neither case is the right delegated. The effect of agreements with the Crown is to particularize the inherent right, not to create it. So, for example, where an Aboriginal group concludes a self-government treaty with the Crown, the group's governmental authority is inherent throughout the full extent of its jurisdiction, in relation to matters in both the core and the periphery.

At this stage, two related questions arise. First, what are the potential outer limits of Aboriginal jurisdiction, including both the core and the periphery?



Second, how does Aboriginal jurisdiction interact with the jurisdictions of the federal and provincial governments? These are complex and difficult matters.

In what follows, we focus on the case of an Aboriginal nation that exercises autonomous authority over an exclusive territory. (Urban and public governments are considered later, in our discussion of models of Aboriginal government.) We deal first with the interaction between federal and Aboriginal jurisdiction, then turn to the question of provincial jurisdiction.<sup>207</sup>

In our view, the relationship between federal and Aboriginal authority is governed by three guiding principles. First, the Aboriginal sphere of authority under section 35(1), including both core and periphery, has roughly the same maximum scope as the federal head of power with respect to 'Indians, and Lands reserved for the Indians' recognized in section 91(24) of the *Constitution Act, 1867*. This sphere includes all matters relating to the good government and welfare of Aboriginal peoples and their territories. This approach assumes that, in the interests of constitutional rationality and harmony, the word 'Indians' in section 91(24) carries the same meaning as the phrase 'aboriginal peoples' in section 35; that is, it extends not only to 'Indians' in the narrow sense of the word, but also to the Métis people and Inuit of Canada.<sup>208</sup>

Second, within this sphere, Aboriginal governments and the federal government generally have concurrent powers; that is, they have independent but overlapping authority. As one commentator has written, "There is no indication that section 35 was intended to supersede completely an established head of Federal power such as section 91(24). So, it follows that Aboriginal governments and the Federal Parliament must have concurrent authority over the matters specified in section 91(24)."<sup>209</sup> Nevertheless, the exercise of federal authority is clearly subject to the terms of section 35(1), which protects Aboriginal and treaty rights, including the inherent right of self-government.

Third, where a conflict arises between an Aboriginal law and a federal law within this concurrent sphere, the Aboriginal law will take priority, except where the federal law satisfies the *Sparrow* standard. Under this standard, federal laws will prevail where the need for federal action can be shown to be compelling and substantial and the legislation is consistent with the Crown's basic trust responsibilities to Aboriginal peoples.<sup>210</sup>

Let us now consider the position of the provincial governments in this scheme. In a broad way, we think that the interaction between Aboriginal and provincial jurisdiction is governed by rules similar to those regulating the interaction of federal and provincial jurisdictions in this area. Under this approach, the matter is governed by four general principles.<sup>211</sup>

First, the provinces cannot single out for special treatment subjects that fall within the concurrent sphere of Aboriginal and federal authority that results from the joint operation of section 35(1) of the *Constitution Act, 1982* and section 91(24) of the *Constitution Act, 1867*. So, for example, provincial legislation

specifically regulating the education of Aboriginal children on Aboriginal territories would be invalid.

Second, provincial laws of general application that affect an integral part of a subject-matter falling within the concurrent Aboriginal-federal sphere are inapplicable within that sphere. For example, general provincial laws governing the use and disposition of property would not apply to lands located within Aboriginal territories, because such laws deal with a subject-matter that is integral to Aboriginal-federal jurisdiction.

Third, subject to these first two principles, provincial laws of general application apply to Aboriginal peoples and their territories in relation to subjects that fall within provincial jurisdiction. In particular, it seems unlikely that section 35(1) establishes Aboriginal enclaves within which general provincial laws have no application. Certain aspects of subject-matters that otherwise fall within the Aboriginal-federal sphere will be susceptible to general provincial laws. For example, general provincial labour laws may well apply to businesses and industries operating on Aboriginal territories; likewise, provincial laws governing the practice of professions such as law and medicine will probably extend to Aboriginal territories, as will provincial traffic laws.<sup>212</sup>

Fourth, this last principle is subject to an important proviso. Where Aboriginal laws conflict with provincial laws of general application, the Aboriginal laws will take precedence. So, for example, Aboriginal labour laws will usually displace any conflicting provincial labour laws within Aboriginal territories, and Aboriginal traffic laws will ordinarily take precedence over conflicting provincial traffic laws.<sup>213</sup>

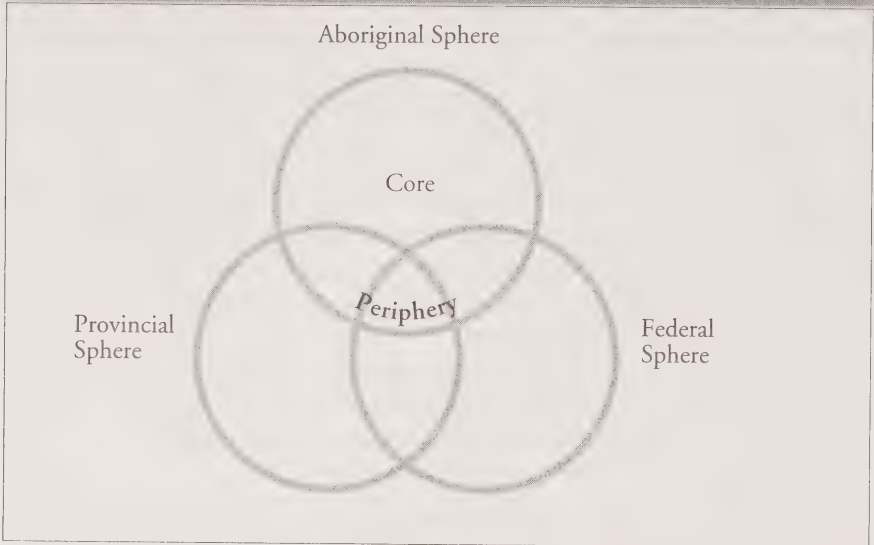
Under this approach, then, Aboriginal peoples have a form of organic jurisdiction. Within core areas, an Aboriginal government is free to establish an exclusive sphere of operation by enacting legislation that is sufficient to displace federal and provincial laws. An Aboriginal government may proceed at its own pace, gradually occupying various areas within the core as need and circumstance dictate. Until an area is occupied by Aboriginal legislation, the area will continue to be governed by federal legislation and provincial laws of general application, under normal constitutional principles. By the same token, once an Aboriginal group vacates an area previously occupied, relevant federal and provincial laws will resume their application. The overall result is illustrated by Figure 3.1.

What is the concrete scope of the entire sphere of Aboriginal jurisdiction, including both the core and the periphery? We saw earlier that, in principle, the sphere comprises all matters relating to the good government and welfare of Aboriginal peoples and their territories. In concrete terms, this probably includes (but is not necessarily limited to) the following subject-matters:

- constitution and governmental institutions
- citizenship and membership

FIGURE 3.1

## Aboriginal, Federal and Provincial Spheres of Jurisdiction



- elections and referenda
- access to and residence in the territory
- lands, waters, sea-ice and natural resources
- preservation, protection and management of the environment, including wild animals and fish
- economic life, including commerce, labour, agriculture, grazing, hunting, trapping fishing, forestry, mining, and management of natural resources in general
- the operation of businesses, trades and professions
- transfer and management of public monies and other assets
- taxation
- family matters, including marriage, divorce, adoption and child custody
- property rights, including succession and estates
- education
- social services and welfare, including child welfare
- health
- language, culture, values and traditions
- criminal law and procedure
- the administration of justice, including the establishment of courts and tribunals with civil and criminal jurisdiction

- policing
- public works and housing
- local institutions.

Which powers fall within the core of Aboriginal jurisdiction, rather than the periphery? As indicated, the core includes all matters that are of vital concern to the life and welfare of a particular Aboriginal people, its culture and identity; do not have a major impact on adjacent jurisdictions; and are not otherwise the object of transcendent federal or provincial concern. To give a partial list, it seems likely that an Aboriginal nation with an exclusive territory would be entitled as a matter of its core jurisdiction to draw up a constitution, set up basic governmental institutions, establish courts, lay down citizenship criteria and procedures, run its own schools, maintain its own health and social services, deal with family matters, regulate many economic activities, foster and protect its language, culture and identity, regulate the use of its lands, waters and resources, levy taxes, deal with aspects of criminal law and procedure, and generally maintain peace and security within the territory. In particular, the regulation of many substantive Aboriginal and treaty rights protected under section 35(1) would probably fall within the core of Aboriginal jurisdiction.

By contrast, to take only one example, an Aboriginal nation would not be entitled as part of its core powers to authorize activities on its territories that potentially pose risks to the health and welfare of people in adjacent jurisdictions, such as the storage of hazardous waste or the pollution of the environment. Such activities would potentially have a major impact on adjacent jurisdictions and so would require intergovernmental agreements.

In most cases, an Aboriginal nation would not be able to exercise its core governmental powers beyond its own territory without intergovernmental treaties or agreements. So, for example, where an Aboriginal government wishes to provide social services to its citizens living in urban centres located outside its territory, it will normally need to conclude treaties or agreements with the other governments concerned.

However, there may be exceptions to this territorial limitation. For example, where an Aboriginal nation holds section 35(1) fishing rights with respect to traditional waters located outside its exclusive territory, the nation is probably capable of regulating the fishing activities of its own citizens in those areas as part of its core powers because, according to the *Sparrow* decision, there are strict limitations on the ability of the federal government to do so under section 35(1).<sup>214</sup> Since the federal government cannot regulate the exercise of a nation's collective Aboriginal fishing rights without meeting a high standard of justification, a jurisdictional vacuum may result unless the nation itself has the capacity to regulate the fishing of its own citizens.



It is interesting to compare the jurisdictional approach outlined here with the draft text of the Charlottetown Accord.<sup>215</sup> The accord proposed inserting the following clauses in the *Constitution Act, 1982*:

- 35.1 (1) The Aboriginal peoples of Canada have the inherent right of self-government within Canada.
- (2) The right referred to in subsection (1) shall be interpreted in a manner consistent with the recognition of the governments of the Aboriginal peoples of Canada as constituting one of three orders of government in Canada.
- (3) The exercise of the right referred to in subsection (1) includes the authority of duly constituted legislative bodies of the Aboriginal peoples, each within its own jurisdiction,
- (a) to safeguard and develop their languages, cultures, economies, identities, institutions and traditions, and
  - (b) to develop, maintain and strengthen their relationship with their lands, waters and environment,
- so as to determine and control their development as peoples according to their own values and priorities and to ensure the integrity of their societies.

This section was balanced by another, providing as follows:

- 35.4 (1) Except as otherwise provided by the Constitution of Canada, the laws of Canada and the laws of the provinces and territories continue to apply to the Aboriginal peoples of Canada, subject nevertheless to being displaced by laws enacted by legislative bodies of the Aboriginal peoples according to their authority.
- (2) No aboriginal law or any other exercise of the inherent right of self-government under section 35.1 may be inconsistent with federal or provincial laws that are essential to the preservation of peace, order and good government in Canada.
- (3) For greater certainty, nothing in this section extends the legislative authority of the Parliament of Canada or the legislatures of the provinces or territories.

Significantly, the Manitoba First Nations Government Framework Agreement, signed on 7 December 1994, follows closely the items listed in section 35.1(3) of the Charlottetown Accord. Article 5.11 of the agreement provides:

First Nations governments in Manitoba will be able to undertake legislative, executive, administrative and judicial functions, based on agreements which are consistent with the inherent right of self-gov-

ernment and, with that proviso, will include, but not be limited to, the protection and promotion of their cultures, identities, institutions, traditions, citizenship, lands, waters, economies and languages.<sup>216</sup>

This list differs from the Charlottetown text in only two respects: the citizenship item is a new one, not found in the Charlottetown text and the environment item, mentioned in the Charlottetown agreement, is not mentioned in the Manitoba agreement. While these represent differences of emphasis, in both instances the missing topics are probably covered by other general headings.<sup>217</sup>

More recently, in August 1995, the government of Canada issued a policy guide entitled *Aboriginal Self-Government*, which is designed to serve as a framework for the negotiation of agreements implementing the inherent right of self-government.<sup>218</sup> In broad terms, the statement views the scope of Aboriginal jurisdiction as likely extending to

matters that are internal to the group, integral to its distinct Aboriginal culture, and essential to its operation as a government or institution.

The guide goes on to flesh out this broad affirmation in substantial detail. It provides three lists of subject-matters. The first list comprises a range of matters that the federal government views as proper subjects for negotiation under the definition just quoted. These include

- the establishment of governing structures, internal constitutions, elections, and leadership selection processes
- membership
- marriage
- adoption and child welfare
- Aboriginal language, culture and religion
- education
- health
- social services
- administration and enforcement of Aboriginal laws, including the establishment of Aboriginal courts or tribunals and the creation of offences of the type normally created by local or regional governments
- policing
- property rights, including succession and estates
- land management, including zoning, service fees, land tenure and access, and expropriation of Aboriginal land
- natural resources management
- agriculture
- hunting, fishing and trapping on Aboriginal lands
- direct taxation and property taxation of members

- transfer and management of monies and group assets
- management of public works and infrastructure
- housing
- local transportation
- licensing and regulation of business

The second list includes areas that, in the federal government's view, go beyond matters that are integral to Aboriginal culture or that are strictly internal to an Aboriginal group. In these areas, the federal government declares its willingness to negotiate some measure of Aboriginal jurisdiction, while specifying that primary law-making authority would remain with the federal or provincial governments, whose laws would prevail in the case of conflict with Aboriginal laws. Subject-matters in this category include the following:

- divorce
- labour and training
- administration of justice issues, including the administration of certain federal criminal laws
- penitentiaries and parole
- environmental protection
- fisheries co-management
- migratory birds co-management
- gaming
- emergency preparedness

The third list includes subject-areas where, in the federal government's view, there are no compelling reasons for Aboriginal governments to exercise law-making authority and that cannot be characterized as either integral to Aboriginal cultures or internal to Aboriginal groups. These areas are grouped under two headings:

1. Powers related to Canadian sovereignty, defence and external relations, including
  - international relations, diplomatic relations and foreign policy
  - national defence and security
  - security of national borders
  - international treaty making
  - immigration, naturalization and aliens
  - international trade, including tariffs and import-export policy
2. Other national interest powers, including
  - management and regulations of the national economy (including such matters as fiscal and monetary policy, the banking system, bankruptcy and currency)

- maintenance of national law and order (including substantive criminal law, emergencies, and matters of “peace, order and good government”)
- protection of the health and safety of all Canadians
- federal undertakings and powers (such as broadcasting and communications, aeronautics, navigation and shipping, and national transportation systems.)

While matters on the third list are excluded from self-government negotiations, the policy guide envisages the possibility of entering into “administrative arrangements” in these areas, where such arrangements are feasible and appropriate.

With respect to the implementation of self-government agreements, the federal government declares its willingness to ensure that the rights set out in such agreements receive constitutional protection as treaty rights within the scope of section 35 of the *Constitution Act, 1982*. This protection may be secured by new treaties or comprehensive land claims agreements, or by additions to existing treaties.

The policy guide affirms that implementation of the inherent right of self-government will not lead to the automatic exclusion of federal and provincial laws, many of which will continue to apply to Aboriginal peoples or co-exist with Aboriginal laws. To minimize conflicts between Aboriginal laws and federal or provincial laws, the federal government proposes that all self-government agreements should establish rules of priority for resolving such conflicts. While these rules may provide for the paramountcy of Aboriginal laws, in the federal government’s view, they may not deviate from the basic principle that “federal and provincial laws of overriding national or provincial importance will prevail over conflicting Aboriginal laws”.

## CONCLUSIONS

10. The Commission concludes that, generally speaking, the sphere of inherent Aboriginal jurisdiction under section 35(1) comprises all matters relating to the good government and welfare of Aboriginal peoples and their territories. This sphere of inherent jurisdiction is divided into two sectors: a core and a periphery.

11. The core of Aboriginal jurisdiction includes all matters that are of vital concern to the life and welfare of a particular Aboriginal people, its culture and identity; that do not have a major impact on adjacent jurisdictions; and that otherwise are not the object of transcendent federal or provincial concern. With respect to these matters, an Aboriginal group has the right to exercise authority and legislate at its own initiative, without the need to conclude federal and provincial agreements.

12. The periphery comprises the remainder of the sphere of inherent Aboriginal jurisdiction. It includes, among other things, subject-matters that have a major impact on adjacent jurisdictions or attract transcendent federal or provincial con-



cern. Such matters require a substantial degree of co-ordination among Aboriginal, federal and provincial governments. In our view, an Aboriginal group cannot legislate at its own initiative in this area until agreements have been concluded with federal and provincial governments.

13. When an Aboriginal government passes legislation dealing with a subject-matter falling within the core, any inconsistent federal or provincial legislation is automatically displaced. An Aboriginal government can thus expand, contract or vary its exclusive range of operations in an organic manner, in keeping with its needs and circumstances. Where there is no inconsistent Aboriginal legislation occupying the field in a core area of jurisdiction, federal and provincial laws continue to apply in accordance with standard constitutional rules.

14. By way of exception, in certain cases a federal law may take precedence over an Aboriginal law where they conflict. However, for this to happen, the federal law has to meet the strict standard laid down by the Supreme Court of Canada in *Sparrow*. Under this standard, the federal law has to serve a compelling and substantial need and be consistent with the Crown's basic fiduciary responsibilities to Aboriginal peoples.

15. In relation to matters in the periphery, a self-government treaty or agreement is needed to settle the jurisdictional overlap between an Aboriginal government and the federal and provincial governments. Among other things, a treaty will need to specify which areas of jurisdiction are exclusive and which are concurrent and, in the latter case, which legislation will prevail in case of conflict. Until such a treaty is concluded, Aboriginal jurisdiction in the periphery remains in abeyance, and federal and provincial laws continue to apply within their respective areas of legislative jurisdiction.

16. A treaty dealing with the inherent right of self-government gives rise to treaty rights under section 35(1) of the *Constitution Act, 1982* and thus becomes constitutionally entrenched. Even when a self-government agreement does not itself constitute a treaty, rights articulated in it may nevertheless become constitutionally entrenched.

## RECOMMENDATIONS

### The Commission recommends that

#### Inherent Right of Self-Government 2.3.4

All governments in Canada recognize that the inherent right of Aboriginal self-government has the following characteristics:

- (a) It is an existing Aboriginal and treaty right that is recognized and affirmed in section 35(1) of the *Constitution Act, 1982*.

- (b) Its origins lie within Aboriginal peoples and nations as political and cultural entities.
- (c) It arises from the sovereign and independent status of Aboriginal peoples and nations before and at the time of European contact and from the fact that Aboriginal peoples were in possession of their own territories, political systems and customary laws at that time.
- (d) The inherent right of self-government has a substantial degree of immunity from federal and provincial legislative acts, except where, in the case of federal legislation, it can be justified under a strict constitutional standard.

### 2.3.5

All governments in Canada recognize that the sphere of the inherent right of Aboriginal self-government

- (a) encompasses all matters relating to the good government and welfare of Aboriginal peoples and their territories; and
- (b) is divided into two areas:
  - core areas of jurisdiction, which include all matters that are of vital concern for the life and welfare of a particular Aboriginal people, its culture and identity, do not have a major impact on adjacent jurisdictions, and are not otherwise the object of transcendent federal or provincial concern; and
  - peripheral areas of jurisdiction, which make up the remainder.

### 2.3.6

All governments in Canada recognize that

- (a) in the core areas of jurisdiction, as a matter of principle, Aboriginal peoples have the capacity to implement their inherent right of self-government by self-starting initiatives without the need for agreements with the federal and provincial governments, although it would be highly advisable that they negotiate agreements with other governments in the interests of reciprocal recognition and avoiding litigation; and
- (b) in peripheral areas of jurisdiction, agreements should be negotiated with other governments to implement and particularize the inherent right as appropriate to the context and subject matter being negotiated.

## *The Canadian Charter of Rights and Freedoms*

Does the *Canadian Charter of Rights and Freedoms* apply to Aboriginal governments exercising the inherent right of self-government, or are these governments exempt from Charter scrutiny in their dealings with people under their jurisdiction?

In posing this question, we have to remember that the Charter contains two types of provisions. Provisions of the first type are general in nature and restrain the activities of all governments to which the Charter applies. Section 2 of the Charter, for example, states that

Everyone has the following fundamental freedoms:

- (a) freedom of conscience and religion;
- (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
- (c) freedom of peaceful assembly; and
- (d) freedom of association.

Provisions of this general type are designed largely to shield individuals from governmental actions restricting or suppressing their basic human rights and freedoms. They usually reflect accepted international standards as expressed, for example, in the *Universal Declaration of Human Rights* and the *International Covenant on Civil and Political Rights*. Many of these general Charter provisions protect not only Canadian citizens but more generally any individuals located on Canadian soil, whether as permanent residents or temporary visitors.

By contrast, Charter provisions of the second type have a more limited scope and apply only to governmental institutions that are specifically identified. For example, section 17(2) states that

Everyone has the right to use English or French in any debates and other proceedings of the legislature of New Brunswick.

This section applies only to the legislature of New Brunswick; it does not apply to the legislatures of other provinces. By the same token, it has no application to Aboriginal governments.

Therefore, even if we suppose that the Charter does apply to Aboriginal governments in a general way, it does not follow that each and every provision of the Charter relates to them. The application of a particular Charter provision depends on its specific wording and intent. When we ask whether the Charter applies to Aboriginal governments, we have in mind Charter provisions that are general in scope, not those with a restricted application.

Another preliminary point worth making is that Aboriginal individuals enjoy the protection of the Charter in their relations with the federal and provincial governments, as well as with all other governments that fall under federal and provincial authority, including Aboriginal governments that exercise delegated powers. The question that we wish to consider here is whether the same

protection extends to individuals (both Aboriginal and non-Aboriginal) in their relations with Aboriginal governments exercising inherent powers under section 35(1) of the *Constitution Act, 1982*. This question concerns all people who fall within the jurisdiction of an Aboriginal government, including not only the citizens of an Aboriginal nation but also residents and visitors on Aboriginal territories. In considering this question, we will use the term 'Aboriginal governments' to refer exclusively to governments exercising inherent rather than delegated powers.

The question is governed largely by section 32(1) of the Charter, which deals with the Charter's application:

This Charter applies

- (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
- (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

As can be seen, the section specifically mentions the federal and provincial governments. It also refers to the Yukon Territory and Northwest Territories, presumably to make it clear that the governments of those territories are bound by the Charter. However, the section does not specifically mention Aboriginal governments. What is the significance of this omission?

### *Two approaches*

There are two main approaches to the matter. The first approach argues that, as a matter of basic constitutional principle, it would be highly anomalous if Canadian citizens enjoyed the protection of the Charter in their relations with every government in Canada except for Aboriginal governments. The general provisions of the Charter are designed to provide a uniform level of protection for individuals in exercising their basic rights and freedoms within Canada. So, for example, in exercising their freedom of expression under section 2(b) of the Charter, individuals should be able to speak freely anywhere in Canada without fear of unwarranted interference or sanctions from any governmental source. This freedom should exist whether a person is located in an Aboriginal territory, a province or a northern territory. It should hold good against all types and levels of governments, whether federal, Aboriginal, provincial or territorial.

According to the first approach, this is the meaning of the fundamental guarantee embodied in section 1 of the Charter:

The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.



This approach also reminds us of the fact that many of the general provisions of the Charter are modelled on international standards with universal application. For example, section 2(b) of the Charter, dealing with freedom of thought and expression, reflects the essence of Article 19 of the *Universal Declaration of Human Rights*, which states:

Everyone shall have the right to freedom of expression; this right shall include freedom to hold opinions without interference and to seek, receive and impart information and ideas of all kinds, regardless of frontiers.<sup>219</sup>

According to this approach, it is hard to imagine that Aboriginal governments are exempt (or would want to be exempt) from this fundamental guarantee, as enshrined in the *Canadian Charter of Rights and Freedoms*.

Viewed in this light, then, the main purpose of section 32(1) is to indicate that governments rather than private individuals are subject to the Charter in their actions. While the section identifies some of the main government bodies subject to the Charter, it does not state that the Charter applies exclusively to those bodies or provide a complete list of government bodies affected. In effect, then, the section leaves open the possibility that there are other government bodies, not mentioned in the section, that are subject to the Charter's provisions. The tacit recognition of an Aboriginal order of government in section 35(1) fulfils that possibility.

The second approach to the question is quite different.<sup>220</sup> It accepts that Aboriginal governments are subject to international human rights standards in their dealings with people under their jurisdiction. However, it argues that an Aboriginal government cannot be held accountable in Canadian courts for alleged violations of the *Canadian Charter of Rights and Freedoms* unless the Aboriginal nation in question has previously consented to the application of the Charter in a binding constitutional instrument, such as a self-government treaty with the Crown. This approach invokes in its favour the detailed terms of the Charter as well as certain broad considerations of policy.

The second approach begins by noting that section 35 of the *Constitution Act, 1982*, which recognizes the Aboriginal and treaty right of self-government, is located outside the Charter, which is found in Part I of the act. Section 35, by contrast, is found in Part II of the act, entitled "Rights of the Aboriginal Peoples of Canada". This arrangement arguably indicates that Aboriginal and treaty rights are not to be balanced against other rights within the context of the Charter but have an autonomous status equal to that of Charter provisions.

What is the relationship, then, between Part I and Part II of the *Constitution Act, 1982*? The answer is provided by section 25 of the Charter, which states as follows:

The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

- (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
- (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

As its wording indicates, section 25 lays down a fundamental rule for interpreting the Charter, stating that the Charter “shall not be construed so as to abrogate or derogate” from aboriginal and treaty rights. The section does not rule out the application of the Charter to aboriginal and treaty rights. Rather, it ensures that the Charter will receive an interpretation that is consistent with those rights in all their amplitude.

The inherent right of self-government is one of the Aboriginal, treaty or other rights or freedoms that pertain to the Aboriginal peoples of Canada mentioned in section 25. The result, according to the second approach, is that the Charter cannot “abrogate or derogate from” the exercise of inherent powers of Aboriginal self-government. Since any limitation on Aboriginal governmental powers would amount to such a derogation, section 25 effectively prevents Aboriginal governments from being held accountable for Charter violations.

This conclusion is reinforced by section 32(1) of the Charter. According to the second approach, not only does the section fail to mention Aboriginal governments specifically, its wording is not broad enough to cover them. Aboriginal governments are neither creatures of federal or provincial governments nor “matters within the authority” of those bodies. They constitute a distinct order of government whose authority is constitutionally guaranteed under section 35(1).

So, according to the second approach, the wording of section 32(1) supports the conclusion that Aboriginal governments exercising inherent powers are completely exempt from the Charter in their operations. If the drafters of the Charter had intended the Charter to apply to Aboriginal governments, they would surely have said so in explicit language, just as they did with the federal and provincial governments.

This interpretation of section 32(1) is bolstered by the fact that section 33 of the Charter, which allows for notwithstanding clauses suspending the operation of certain Charter provisions, does not specifically mention Aboriginal governments:

Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

The section goes on to specify that a notwithstanding clause expires automatically after five years but can be re-enacted.

So, although section 33 allows the federal and provincial governments to suspend the application of certain sections of the Charter, it does not specifically extend this right to Aboriginal governments. According to the second approach, this silence suggests once again that the Charter was not designed to apply to Aboriginal governments exercising inherent powers; otherwise, they would have been mentioned in the section.

These arguments can also be supported on broad policy grounds. One of the main purposes of section 25 is to ensure that Aboriginal peoples can exercise their distinctive rights in a manner consistent with their philosophical outlooks, cultures and traditions. According to the second approach, some Charter provisions reflect individualistic values that are antithetical to many Aboriginal cultures, which place greater emphasis on the responsibilities of individuals to their communities. In any case, interpretation of the Charter lies ultimately in the hands of judges who are often unfamiliar with Aboriginal ways and likely to prove unsympathetic to them when they depart from standard Canadian approaches. According to this view, then, if the Charter applied to Aboriginal governments, it could hamper and even stifle the efforts of Aboriginal nations to revive and strengthen their cultures and traditions. As such, the Charter might operate as the unwitting servant of the forces of assimilation and domination.

### *The Commission's view*

Which of these two approaches should prevail? In our view, each approach has notable strengths and weaknesses, which tend to counterbalance one another. Rather than adopt one or the other, we think it preferable to take an intermediate approach that combines the strengths of both while avoiding the extremes they represent.

This intermediate solution embodies three basic principles. First, all people in Canada are entitled to enjoy the protection of the Charter's general provisions in their relations with governments in Canada, no matter where in Canada the people are located or which governments are involved. On this ground alone, the general provisions of the Charter apply to Aboriginal governments, and section 32(1) of the Charter should be read in this light. Second, Aboriginal governments occupy the same basic position relative to the Charter as the federal and provincial governments. Aboriginal governments should thus have recourse to notwithstanding clauses under section 33 to the same extent as the federal and provincial governments. Third, in its application to Aboriginal governments, the Charter should be interpreted in a manner that allows considerable scope for distinctive Aboriginal philosophical outlooks, cultures and traditions. This interpretive rule is found in section 25 of the Charter. It applies with particular force where distinctive Aboriginal perspectives on human rights have been consolidated in Aboriginal charters of rights and responsibilities.

Our overall approach is governed by one central consideration. The drafters of the *Constitution Act, 1982* did not provide in explicit language for Aboriginal governments or attempt to describe their exact position in the Canadian federation. They contented themselves with general references to Aboriginal and treaty rights in sections 35(1) and 25, references that, in our view, are broad enough to include the inherent right of self-government. If section 35(1) is interpreted as recognizing the inherent right, we think that section 32(1) of the Charter should be read in a way that takes account of this recognition. Otherwise, there would be a serious imbalance in the application of the Charter, one that should be avoided in the absence of explicit language to the contrary. In other words, the 'unpacking' of the rights referred to in section 35(1) should be achieved in a manner that takes account of the central position of the Charter in Canada's overall constitutional scheme.

We agree that the main purpose of section 32(1) is to indicate that governments rather than private individuals are subject to the Charter. The wording of the section is not exhaustive. It allows for the possibility that government bodies not specifically named in the section are subject to the Charter's provisions. The tacit recognition of an Aboriginal order of government in section 35(1) leads us to take a broad view of the terms of section 32(1).

This same approach applies, in our opinion, to section 33 of the Charter, the provision regarding notwithstanding clauses. As with section 32(1), the section does not mention Aboriginal legislatures. In interpreting section 33, we should remember that it operates in tandem with section 32(1) and moderates its impact. While section 32(1) makes the Charter applicable to governments, section 33 gives those same governments a measure of latitude and allows them to shield themselves from certain Charter provisions for a period. The close connection between the two sections suggests that they should be interpreted in the same way. For this reason, we think that section 33 should be read as permitting governments of Aboriginal nations to pass notwithstanding clauses in the same manner as the federal and provincial governments.

This conclusion is tempered by a basic consideration. The power to pass notwithstanding clauses belongs only to an Aboriginal nation and, in the absence of self-government treaties, can be exercised only in relation to matters falling within the core areas of Aboriginal jurisdiction. This means that the governments of local Aboriginal communities do not have the power to pass notwithstanding clauses. It also means that for an Aboriginal nation to pass notwithstanding clauses in relation to matters falling within the periphery, the power to pass such clauses must be acknowledged specifically in self-government treaties or agreements with the Crown.

The application of the Charter to Aboriginal governments is moulded and tempered by the mandatory provisions of section 25. This section clearly rules out any interpretation of the Charter that would attack the existence of



Aboriginal governments or undermine their basic powers. It also ensures that the Charter will receive a flexible interpretation that takes account of the distinctive philosophies, traditions and cultural practices that animate the inherent right of self-government. Section 25 prevents distinctive Aboriginal understandings and approaches from being washed away in a flood of undifferentiated Charter interpretation.

The Charter is a flexible instrument, one that gives governments a significant measure of latitude in implementing its terms. In particular, section 1 enables governments to enact reasonable limits on Charter rights so long as these "can be demonstrably justified in a free and democratic society". This section is, of course, available to Aboriginal governments. Section 25 gives an Aboriginal government an alternative way to justify its activities when these are challenged under the Charter. The section enables an Aboriginal government to argue that certain governmental rules or practices, which may seem unusual by general Canadian standards, are consistent with the particular culture, philosophical outlook and traditions of the Aboriginal nation, and as such are justified. This approach is consistent with the contextual approach that the Supreme Court of Canada has adopted more generally in applying the Charter.

In reaching this conclusion, we have been assisted by the analysis of Peter Hogg and Mary Ellen Turpel.<sup>221</sup> These authors suggest that, despite the silence of section 32 of the Charter with reference to Aboriginal governments, it is probable that a court would hold that Aboriginal governments are bound by the Charter.<sup>222</sup> This result would be especially likely in cases where self-government has been implemented with the support of federal or provincial legislation. However, even where an Aboriginal government exercises inherent powers at its own initiative, it is unlikely that a court would regard section 25 as providing blanket immunity from the Charter. The probable effect of section 25 will be to exempt certain actions of Aboriginal governments from Charter scrutiny and to ensure that the Charter will be interpreted in a manner "deferential to and consistent with Aboriginal culture and traditions."<sup>223</sup>

Regarding deference to Aboriginal cultures and traditions, Hogg and Turpel make a number of useful points:

Interpretations of the Charter that are consistent with Aboriginal cultures and traditions would probably be found when the court is faced with a situation where different standards apply and the difference is integral to culturally-based policy within an Aboriginal community. For example, if an Aboriginal juvenile justice system were created in which legal counsel was not provided to an accused person, would this be considered unconstitutional as denying a legal right to an accused person? If the juvenile justice system reflected Aboriginal culture and traditions, section 25 would shield such practices from attack based on the values expressed in the legal rights provisions of

the Charter. In other words, the legal rights provisions would be given a new interpretation in light of Aboriginal traditions.

The important point here is that the application of the Charter, when viewed with section 25, should not mean that Aboriginal governments must follow the policies and emulate the style of government of the federal and provincial governments. Section 25 allows an Aboriginal government to design programs and laws that are different, for legitimate cultural reasons, and have these reasons considered relevant should such differences invite judicial review under the Charter. Section 25 would allow Aboriginal governments to protect, preserve and promote the identity of their citizens through unique institutions, norms and government practices.<sup>224</sup>

In endorsing this approach, we wish to emphasize that section 35(4) of the *Constitution Act, 1982* lays down a broad and unqualified rule ensuring the equality of the sexes in the enjoyment of Aboriginal and treaty rights, including the inherent right of self-government. The section provides that

Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

This provision is reinforced by section 28 of the Charter, which states that

Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

Singly and in combination, these provisions constitute an unshakeable guarantee that Aboriginal women and men have equal access to the inherent right of self-government and that they are entitled to equal treatment by their governments. By their explicit terms, these provisions transcend any other provisions of the Charter, including section 33.<sup>225</sup>

Where an Aboriginal nation enacts its own charter of rights and responsibilities, private individuals will benefit from its provisions in addition to those of the Canadian Charter. An Aboriginal charter will supplement the Canadian Charter but not displace it. A person subject to the authority of the Aboriginal government will still have direct access to the Canadian Charter. However, in construing the Canadian Charter in the light of section 25, a court may well find the provisions of the Aboriginal charter a useful interpretive guide. For example, where an Aboriginal charter contains a series of provisions dealing with the treatment of accused persons in an Aboriginal justice system, a court should ordinarily take these provisions into serious account in determining the effect of the legal rights provisions of the Canadian Charter with respect to the Aboriginal government in question.<sup>226</sup>

In our view, the interpretive influence of an Aboriginal charter will likely be amplified if it forms part of a self-government treaty between an Aboriginal nation and the Crown, because section 25 specifically shields treaty rights from the impact of the Canadian Charter. Where a self-government treaty includes an Aboriginal charter among its provisions, it appears that courts would be bound to take the terms of this charter into serious account in interpreting any related provisions of the Canadian Charter.

## CONCLUSION

17. The Commission concludes that the *Canadian Charter of Rights and Freedoms* applies to Aboriginal governments and regulates relations with individuals falling within their jurisdiction. However, under section 25, the Charter must be given a flexible interpretation that takes account of the distinctive philosophies, traditions and cultural practices of Aboriginal peoples. Moreover, under section 33, Aboriginal nations can pass notwithstanding clauses that suspend the operation of certain Charter sections for a period. Nevertheless, by virtue of sections 28 and 35(4) of the *Constitution Act, 1982*, Aboriginal women and men are in all cases guaranteed equal access to the inherent right of self-government and are entitled to equal treatment by their governments.

### The central role of the Aboriginal nation

Which bodies of Aboriginal people currently hold the inherent right of self-government recognized in section 35? Does the right vest in local communities, as these have been moulded historically? Or is the right held only by Aboriginal nations in the sense identified earlier in the chapter? (See our earlier discussion on self-determination.) While our response to this question is similar to that given in our discussion of self-determination, it also has some differences that reflect the distinctive character of the constitutional right of self-government.

In our view, the inherent right of self-government is vested in the entire people making up an Aboriginal nation and so is shared in an organic fashion by the various overlapping groups that make up the nation, from the local level upward. The inherent right does not vest in local communities as such, considered apart from the nations of which they are part. In effect, for an Aboriginal people to exercise the inherent governmental powers at their disposal, they will have to draw up a national constitution that establishes an overall structure of government. In many cases this structure will include not only national but also local institutions. Within such multi-level structures, each level of government can be viewed as exercising its own powers, powers that are appropriate to its particular sphere of authority and that spring in each case from the people concerned.

For example, with respect to matters falling within the core jurisdiction, a national constitution might well provide that local communities have the power to establish their own primary schools and initiate certain training programs as part of their powers over education. However, in most cases only the national government will be able to put in place a full-fledged education system. Likewise, while a local community may take certain initiatives in the area of justice, establishing an Aboriginal court system will normally be the work of the nation.

Turning now to the periphery of Aboriginal jurisdiction, we recall that treaties or agreements with the Crown are necessary to activate inherent powers in these areas. In our view, only the people of the nation as a whole can negotiate and conclude treaties relating to inherent governmental powers. A local community does not have the capacity to negotiate a separate treaty for itself. Of course, a self-government treaty concluded by a nation may take a number of different forms. It may, for example, specify that ratification at the community level is necessary for the treaty to take effect. It may also provide that a substantial measure of power will be exercised by local governments, in both the core and the periphery. The distribution of powers among the various levels of government is a matter for the people of the nation as a whole to determine.

In our opinion, negotiations to implement the inherent right of self-government cannot bypass the nation and proceed on a community-by-community basis. Although it is possible for a local Aboriginal community to obtain delegated powers from the federal or provincial governments, the inherent jurisdiction of Aboriginal peoples can be exercised only through initiatives and treaties at the level of the nation. On this point, we share the view expressed by Sharon McIvor, speaking for the Native Women's Association of Canada:

Self-government should be granted to 'Nations', not to Band Councils....Each band council does not represent a nation....Any self-government agreement must be negotiated on a nation-to-nation basis. This being the case, discussion in the constitutional meetings must focus on the matter of determining what nations are, and what their governments will be.

Sharon McIvor  
Native Women's Association of Canada  
Toronto, Ontario, 26 June 1992

We recognize that there are obstacles to implementing this approach to self-government. In the case of First Nations, for example, one of the effects of the band orientation of the *Indian Act* has been to foster loyalties at the level of the local community, at the expense of broader national affinities arising from a common language, culture, spirituality and historical experience. Moreover, as we saw earlier, many Aboriginal people appearing before the Commission emphasized the need for strong local input to decision making and affirmed the principle that leaders should be responsible to the people they represent.



We fully recognize the need for strong local input and political accountability, in keeping with the democratic traditions of many Aboriginal peoples. There is also a need for larger governmental structures, however, if the full range of powers and benefits associated with an Aboriginal order of government are to be realized. In striking the right balance, there are two major considerations. First, community-level governments will generally continue to be poor, weak and isolated unless they form part of larger governmental structures. Second, there is a danger that such larger structures may become bureaucratic and remote unless they remain in close touch with the communities they represent. These competing considerations point once again to the need for multi-level or federal constitutional structures as a basic mode of governmental organization within Aboriginal nations.

While we do not suggest that current initiatives to implement self-government at the local level should come to a complete halt, we do believe that such initiatives must be placed in the larger context of Aboriginal nations. It is necessary for local communities to join together in their nations to exercise the core powers at their disposal and to negotiate treaties or agreements regarding powers in the periphery. This nation-based approach does not, of course, rule out approaches that encompass two or several Aboriginal nations.

## CONCLUSION

18. The Commission concludes that the constitutional right of self-government is vested in the people that make up Aboriginal nations, not in local communities as such. Only nations can exercise the range of governmental powers available in the core areas of Aboriginal jurisdiction, and nations alone have the power to conclude self-government treaties regarding matters falling within the periphery. Nevertheless, local communities of Aboriginal people have access to inherent governmental powers if they join together in their national units and agree to a constitution allocating powers between the national and local levels.

## RECOMMENDATION

The Commission recommends that

Aboriginal  
Nations and  
Self-Determination

2.3.7

All governments in Canada recognize that the right of self-government is vested in Aboriginal nations rather than small local communities.



## Citizenship in Aboriginal nations

Aboriginal people are both Canadian citizens and citizens of their particular nations. Thus they hold a form of dual citizenship, which permits them to maintain loyalty to their nation and to Canada as a whole.<sup>227</sup> Here we consider the rules governing individual citizenship or membership in Aboriginal nations. (For discussion of the position of non-citizen residents of Aboriginal territories, see section beginning on page 289 and Recommendation 2.3.22.)

In our view, the right of an Aboriginal nation to determine its own citizenship is an existing Aboriginal and treaty right within the meaning of section 35(1) of the *Constitution Act, 1982*. At the same time, any rules and processes governing citizenship must satisfy certain basic constitutional standards flowing from the terms of section 35 itself. The purpose of these standards is to prevent an Aboriginal group from unfairly excluding anyone from participating in the enjoyment of collective Aboriginal and treaty rights guaranteed by section 35(1), including the right of self-government. In other words, the guarantee of Aboriginal and treaty rights in section 35 could be frustrated if a nation were free to deny citizenship to individuals on an arbitrary basis and thus prevent them from sharing in the benefit of the collective rights recognized in section 35.

The most obvious of these constitutional standards is laid down in section 35(4), which states that Aboriginal and treaty rights are guaranteed equally to male and female persons. Since Aboriginal and treaty rights are generally collective rather than individual rights, an individual can have access to them only through membership in an Aboriginal group. It follows that the rules and processes governing membership cannot discriminate against individuals on grounds of sex, for to do so would violate the guarantee embodied in section 35(4).

Section 35 embodies a second basic standard. As we saw earlier, the Aboriginal peoples recognized in the section are political and cultural entities rather than racial groups. While it is true that a group must descend from the original peoples of North America to qualify as Aboriginal, that historical link can be established in a variety of ways. Modern Aboriginal nations, like other nations in the world today, usually represent a mixture of genetic backgrounds. The Aboriginal identity lies in people's collective life, their history, ancestry, culture, values, traditions and ties to the land, rather than in their race.

In our view, this fundamental principle has implications at two levels. It not only governs recognition of Aboriginal groups as collective entities under section 35, it also lays down a basic standard governing individual membership in such groups. It prevents an Aboriginal group from specifying that a certain degree of Aboriginal blood (what is often called blood quantum) is a general prerequisite for citizenship. On this point, it is important to distinguish between rules that specify ancestry as one among several ways of establishing eligibility for membership and rules that specify ancestry as a general prerequisite. By general pre-

requisite, we mean a requirement that applies in all cases or that only allows for very limited exceptions. For example, a citizenship code that requires that a candidate must be at least 'half-blood', except in cases of marriage or adoption, would lay down a general prerequisite and as such, in our view, be unconstitutional. By contrast, it would be acceptable for a code to specify, for example, that someone with at least one parent belonging to the group qualifies for citizenship, so long as this provision represents only one among several general ways for an individual to qualify for membership, including, for example, meeting such criteria as birth in the community, long-time residency, group acceptance and so on.

In offering this opinion, we recognize the sensitive nature of the subject and the existence of strongly held opposing views. We also acknowledge the legitimate concerns that underlie these views. After all, birth is the normal way to acquire citizenship, and descent is the normal way a nation's culture and identity are perpetuated. The citizenship codes of most countries, including Canada, reflect that reality. None of this leads us to believe, however, that a minimum blood quantum is an acceptable general prerequisite for membership in an Aboriginal group.

For example, suppose that the citizenship code of an Aboriginal nation states that individuals qualify for membership only if at least one of their grandparents was a full-blooded member of the nation, except in cases of adoption. On the surface, this might seem a reasonable minimum qualification. However, in our opinion, the rule places the emphasis in the wrong place and is liable to operate in an arbitrary and unjust fashion.

Consider the position of a child who is born into an Aboriginal community and raised as an ordinary member of the group, playing with the other children, attending the same school, speaking the same language and following the same overall pattern of life. The child's father, while born and raised in the community, is of mixed origins: the father's father, although also born and raised in the same community, is half-blood, while the father's mother is of Scottish stock. It also happens that the child's mother comes from another part of Canada and, although Aboriginal in ancestry, was born to parents belonging to another Aboriginal nation. According to the applicable rule, this child is not eligible for membership because none of the four grandparents was a full-blooded member of the nation: one was Scottish, another was half-blood and two belonged to another Aboriginal nation. This result is both illogical and unjust.

It should be remembered that, under the traditional practices of most Aboriginal groups, birthright was not the only method by which group membership could be acquired. Methods such as marriage, adoption, ritual affiliation, long-standing residence, cultural integration and group acceptance were also widely recognized. As Rene Lamothe has noted with respect to Dene:

In the traditions of the Dene elders, because The Land is the boss and will teach whoever She wants, they will accept as Dene anyone who

comes to know and live as they know and live. At that time they will be only too eager to share their responsibility for jurisdiction and governance. This is not a note on racial relationships, it is a statement to the belief of the Dene that The Land is the boss of culture, that culture is inextricably tied to The Land, and that people are required to adapt their way of life to the teachings of The Land.<sup>228</sup>

In our view, any code that specifies a minimum blood quantum as a general prerequisite for citizenship is not only unconstitutional under section 35, it is also wrong in principle, inconsistent with the historical evolution and traditions of most Aboriginal peoples, and an impediment to their future development as autonomous political communities.

## CONCLUSION

19. The Commission concludes that under section 35 of the *Constitution Act, 1982*, an Aboriginal nation has the right to determine which individuals belong to the nation as members and citizens. However, this right is subject to two basic limitations. First, it cannot be exercised in a manner that discriminates between men and women. Second, it cannot specify a minimum blood quantum as a general prerequisite for citizenship. Modern Aboriginal nations, like other nations in the world today, represent a mixture of genetic heritages. Their identity lies in their collective life, their history, ancestry, culture, values, traditions and ties to the land, rather than in their race as such.

## RECOMMENDATIONS

The Commission recommends that

### Aboriginal 2.3.8

Citizenship The government of Canada recognize Aboriginal people in Canada as enjoying a unique form of dual citizenship, that is, as citizens of an Aboriginal nation and citizens of Canada.

### 2.3.9

The government of Canada take steps to ensure that the Canadian passports of Aboriginal citizens

- (a) explicitly recognize this dual citizenship; and
- (b) identify the Aboriginal nation citizenship of individual Aboriginal persons.



### 2.3.10

Aboriginal nations, in exercising the right to determine citizenship, and in establishing rules and processes for this purpose, adopt citizenship criteria that

- (a) are consistent with section 35(4) of the *Constitution Act, 1982*;
- (b) reflect Aboriginal nations as political and cultural entities rather than as racial groups, and therefore do not make blood quantum a general prerequisite for citizenship determination; and
- (c) may include elements such as self-identification, community or nation acceptance, cultural and linguistic knowledge, marriage, adoption, residency, birthplace, descent and ancestry among the different ways to establish citizenship.

### 2.3.11

As part of their citizenship rules, Aboriginal nations establish mechanisms for resolving disputes concerning the nation's citizenship rules generally, or individual applications specifically. These mechanisms are to be

- (a) characterized by fairness, openness and impartiality;
- (b) structured at arm's length from the central decision-making bodies of the Aboriginal government; and
- (c) operated in accordance with the *Canadian Charter of Rights and Freedoms* and with international norms and standards concerning human rights.

## Three orders of government

The enactment of section 35 of the *Constitution Act, 1982* had far-reaching structural significance. It confirmed the status of Aboriginal peoples as partners in the complex federal arrangements that make up Canada. It provided the basis for recognizing Aboriginal governments as one of three distinct orders of government in Canada: Aboriginal, provincial and federal. The governments making up these three orders share the sovereign powers of Canada as a whole, powers that represent a pooling of existing sovereignties.

Shared sovereignty, in our view, is a hallmark of the Canadian federation and a central feature of the three-cornered relations that link Aboriginal governments, provincial governments and the federal government. These governments are sovereign within their respective spheres and hold their powers by virtue of their constitutional status rather than by delegation. Nevertheless,

many of their powers are shared in practice and may be exercised by more than one order of government.

The constitutional reforms of 1982 had another important effect. In completing the process by which Canada became independent of the United Kingdom, the constitution confirmed that the Canadian Crown is constitutionally distinct from the British Crown, even if for historical reasons the two offices continue to be occupied by the same person.<sup>229</sup> The Canadian Crown is no longer the symbol of British imperial authority. It stands for all the people of Canada, regardless of origin, ethnicity, culture, religion or language.

The Canadian Crown also symbolizes the association of the various political units that make up the country. Canada is a federal state composed of a number of political units with diverse origins, bound together by a complex body of basic law making up the constitution of Canada. The constitution governs how the cluster of rights and jurisdictions are shared by various governmental institutions and political entities, including the federal government, the provinces and Aboriginal nations.

The word 'shared' is used advisedly here, in preference to a term such as 'distributed' which would suggest a single, centralized source. As we have seen, many of the political units that make up Canada entered the federation bearing powers, rights and responsibilities that stemmed from historical roots deeply embedded in the communities in question. So, while the constitution of Canada recognized (and sometimes restructured) those powers and rights, it did not constitute their ultimate source.

The Crown of Canada is, in part, the symbol of the constitutional relationship among various autonomous political communities, each with its distinctive history and internal constitution; it also represents the federal institutions that give concrete expression to this relationship. Contrary to some imperial views, the Canadian Crown is not the notional fountain of all governmental power and jurisdiction; to the contrary, it represents a partial pooling of powers that flow from a variety of sources, Aboriginal and non-Aboriginal alike.

It would be wrong to say that the Crown has sovereignty over Aboriginal peoples, on a quasi-imperial model. Rather, it is the living symbol of a federal arrangement involving a partial merging of sovereignty and the guaranteed retention of certain sovereign powers by the various political units that make up Canada, including Aboriginal peoples.

Of course, Aboriginal peoples have a range of differing relations with the Crown, so their constitutional status within Canada varies, depending on their distinctive histories. Here we can give only a partial sketch of the subject.<sup>230</sup> We will focus on the constitutional position of Aboriginal peoples that hold long-standing treaty or customary relations with the Crown, as this position was reflected in the *Royal Proclamation of 1763*. The proclamation speaks of "the several Nations or Tribes of Indians, with whom We are connected, and who live

under Our Protection” (See the discussion of the proclamation in Volume 1, Chapter 5). For convenience, we will speak of these peoples as having ‘proclamation-style’ governments, in contrast to more standard ‘Westminster-style’ governments.

A proclamation-style government has a distinctive relationship with the Crown of Canada. While the Crown is the head of the executive branches of the federal and provincial governments, the Crown does not constitute the executive head of an Aboriginal government, unless, of course, the people in question adopt Westminster-style arrangements. Strictly speaking, under the proclamation model, there is no Crown expressed through the Mi’kmaq Nation, comparable to the Crown expressed through the province of Nova Scotia.

This basic difference manifests itself in a number of ways. First, whereas federal and provincial bills technically need the assent of the Crown in order to take effect, laws enacted by proclamation-style governments do not need Crown assent. Even in the case of federal and provincial statutes, the requirement is a purely formal one, because under Canadian constitutional convention the Crown cannot withhold assent. However, in the case of Aboriginal governments, this formal requirement does not exist.

Second, while the activities of the executive branches of the federal and provincial governments are carried on in the name of the Crown, this is not the case with a proclamation-style government. The executive branch of an Aboriginal government of this type acts directly in the name of the people as a whole or in some other capacity under the nation’s laws and customs.

Finally, while Canadian courts dispense justice in the name of the reigning monarch, Aboriginal courts and other organs of justice in proclamation-style systems act in the name of the people as a whole or in some other capacity laid down by the nation’s laws and customs.

These features point to the fact that, under the proclamation model, Aboriginal peoples and their governments have unique relationships with the Crown, that is, relationships distinctive to the particular peoples in question. The character of these relationships is not determined by the constitutional arrangements reached in 1867 between the French-speaking and English-speaking representatives of Lower and Upper Canada, Nova Scotia and New Brunswick, the four original parties to the *Constitution Act, 1867*. The relationship is governed primarily by the treaties and other historical relationships formed between Aboriginal nations and the Crown and by the inter-societal law and custom that underpinned them. At the core of these inter-societal links is a fiduciary relationship under which the Crown stands as the protector of the sovereignty of Aboriginal peoples within Canada and as guarantor of their Aboriginal and treaty rights. This fiduciary relationship is a fundamental feature of the constitution and more especially of section 35 of the *Constitution Act, 1982*. (See our discussion of the principles of a renewed relationship in Volume 1, Chapter 16.)

On this point, we draw inspiration from the ancient vision of the Great Tree of Peace, as expressed by the Peacemaker, the Huron prophet who inspired the formation of the Five Nations Confederacy. The Peacemaker envisioned a great white pine with four white roots that extended in the four directions of the earth. A snow-white mat of feathery thistledown spread out from under the tree, carpeting the surrounding countryside and protecting the peoples that embraced the three basic principles of peace, power and the good mind. The Peacemaker explained that the tree represented humanity living according to these principles. An eagle perched at the very summit of the tree was humanity's lookout against people who might disturb the peace. The Peacemaker's vision was thus potentially universal in its scope:

He postulated that the white carpet could cover the entire earth and provide a shelter of peace and brotherhood for all mankind. His vision was a message from the Creator, bringing harmony to human existence and uniting all peoples into a single family.<sup>231</sup>

In some respects, this vision of a federation of peoples united in peace and fellowship resembles the one that we hold for Canada.

We acknowledge that the image of the Canadian federation presented here is not shared by all Aboriginal peoples and that a variety of differing views was expressed in Commission hearings and briefs. In particular, some Aboriginal nations consider that they are not part of the Canadian federation at all but are linked to the Crown by international treaties and other relations. These views are based on historical and political considerations that require thoughtful appraisal. Nevertheless, we consider that the issues they raise are better resolved in a context of political negotiations rather than by Canadian courts as a matter of existing constitutional law. (See the discussion of the legal context of treaties in Chapter 2 of this volume.)

It is important to recognize that whatever the formal legal position, in practice Canadian governments often have little political and moral legitimacy among Aboriginal peoples. This reality reflects the historical fact that Aboriginal peoples have been subjected to shockingly unjust and coercive governmental policies that have denied them their most basic rights, stripped them of their ancestral lands and attempted to suppress their very identities. In our view, there is a profound need for a process that will afford Aboriginal peoples the opportunity to restructure existing governmental institutions and participate as partners in the Canadian federation on terms they freely accept. The existing constitutional right of self-government under section 35 is no substitute for a just process that implements the basic right of self-determination by means of freely negotiated treaties between Aboriginal nations and the Crown.



## CONCLUSIONS

20. The Commission concludes that, overall, the enactment of section 35 of the *Constitution Act, 1982* has had far-reaching significance. It serves to confirm the status of Aboriginal peoples as equal partners in the complex federal arrangements that make up Canada. It provides the basis for recognizing Aboriginal governments as one of three distinct orders of government in Canada: Aboriginal, provincial and federal. The governments making up these three orders are sovereign within their several spheres and hold their powers by virtue of their inherent or constitutional status rather than by delegation. They share the sovereign powers of Canada as a whole, powers that represent a pooling of existing sovereignties.

21. Aboriginal peoples also have a special relationship with the Canadian Crown, which the courts have described as *sui generis* or one of a kind. This relationship traces its origins to the treaties and other links formed over the centuries and to the inter-societal law and custom that underpinned them. By virtue of this relationship, the Crown acts as the protector of the sovereignty of Aboriginal peoples within Canada and as guarantor of their Aboriginal and treaty rights. This fiduciary relationship is a fundamental feature of the constitution of Canada.

22. Nevertheless, there is a profound need for a process that will afford Aboriginal peoples the opportunity to restructure existing governmental institutions and participate as partners in the Canadian federation on terms they freely accept. The existing right of self-government under section 35 of the *Constitution Act, 1982* is no substitute for a just process that implements the basic right of self-determination by means of freely negotiated treaties between Aboriginal nations and the Crown.

## RECOMMENDATION

The Commission recommends that

Jurisdiction and 2.3.12

Orders of  
Government

All governments in Canada recognize that

- (a) section 35 of the *Constitution Act* provides the basis for an Aboriginal order of government that coexists within the framework of Canada along with the federal and provincial orders of government; and that
- (b) each order of government operates within its own distinct sovereign sphere, as defined by the Canadian constitution, and exercises authority within spheres of jurisdiction having both overlapping and exclusive components.

### 3. IMPLEMENTING AN ABORIGINAL ORDER OF GOVERNMENT

#### 3.1 Models of Aboriginal Government: An Overview

The exercise of self-determination and self-government will assume many forms according to Aboriginal peoples' differing aspirations, circumstances and capacity for change. In practice, therefore, we anticipate that many variations will emerge in the implementation of the broad approaches outlined in this section.

Some Aboriginal peoples will implement forms of Aboriginal government organized around a substantially autonomous nation. For them, internal and inter-governmental relations will focus on a strong sense of nationhood as reflected, for example, in jurisdiction over territory and recognition of a distinct Aboriginal citizenship base. Other Aboriginal peoples, notably those in the northern parts of Canada, may exercise public leadership and control over the government of a territory, representing all residents, Aboriginal and non-Aboriginal alike. That may be the most practical and effective route to ensure that Aboriginal rights and traditions are sustained and protected and that resources are managed in an equitable way now and in the future. Validating nationhood through a form of government that involves responsibility for non-Aboriginal people is seen by some Aboriginal people as consistent with the goals of self-government and the traditional understanding of sharing and interdependency. Finally, some Aboriginal people, especially those living among non-Aboriginal people in an urban or rural setting, will focus their aspirations on acquiring government powers and authority over education, health and social services.

Our approach in this chapter is to consider three primary models of Aboriginal government. These models represent hypothetical forms of government to the extent that they do not exist fully today, although many aspects of the models can be found in existing and traditional Aboriginal forms of government. They are not intended as ideals or prescriptions but rather as one source of guidance from which Aboriginal peoples will choose their direction. We hope that these models will also demonstrate to non-Aboriginal Canadians that Aboriginal self-government and self-determination are realistic and workable goals.

For purposes of our discussion, the three broad models of Aboriginal government are the nation government model, the public government model, and the community of interest government model. In briefly describing each approach, we consider the following general features:

- lands and territory
- citizenship
- jurisdiction and powers
- internal government organization

- urban extensions of Aboriginal nation government
- associated models of inter-Aboriginal government organization.

There is great variation in how Aboriginal people see themselves as peoples and as nations. The *Indian Act* and associated government policies have had a significant and, in our view, detrimental impact on their consciousness as nations. The act has caused the breakup of Indian nations and the diffusion of their power. Consequently, some people identify their *Indian Act* band as a nation and refer to them as First Nations or nations. Others identify the nation on the basis of a broader traditional affiliation, for example, Cree, Mohawk, Gitksan, Kwakwaka'wakw and Dene. Some First Nations refer to themselves as treaty nations because they have made treaties with the Crown.

Inuit frequently associate their identity with self-determination, rather than nationhood, although clearly they have a national identity and consciousness. They have strong regional alliances and affiliations with Inuvialuit of the western Northwest Territories, Inuit of Nunavut, Nunavik and Quebec, and Labrador Inuit. These regional alliances have an impact on organization for the purposes of government.

A strong national identity has been articulated by the Métis people of western Canada and has guided the development of Métis Nation political organizations at the community, provincial, territorial and national levels. Métis people in eastern Canada are organized less cohesively around the model of a single nation.

Among the Aboriginal nations of Canada, factors that will influence the organization of Aboriginal nation governments include

- historical treaty and other relations,
- cultural characteristics,
- social organization,
- economic situation,
- political culture, philosophy and traditions of political organization,
- geographic features,
- territorial size and existing land base,
- degree of contiguity in territory,
- population size and concentration or distribution of population, and
- existing provincial and territorial boundaries.

In testimony and submissions to the Commission some Aboriginal people indicated support for governance relationships that do not take as their starting point Aboriginal-only forms of government. For example, Inuit have actively pursued the public government model, a form of government in which all the residents of a particular region or territory would be represented. For these and other Aboriginal peoples, the most practical route to achieving greater autonomy and effective control over their lives is through leadership and authority in Aboriginal

public governments that already exist or may be established within their traditional territory.<sup>232</sup>

Nationhood can be validated and Aboriginal rights and traditions protected through effective control over traditional lands and resources within a defined territory. At the same time, traditional understandings of interdependency and sharing can be realized through a public government's efforts to represent the interests of all residents. Within a defined geographic area, a public form of government can accommodate and contribute to the realization of Aboriginal objectives with respect to

- self-determination;
- increased Aboriginal control over decision making, management and use of traditional lands and resources; and
- governments that are responsive to the people served; have the legal authority and capacity to define and meet local and regional needs; and contribute to self-sufficiency through the development of local and regional lands, resources and economies.

The most apparent distinction between the public government model and other forms of Aboriginal government is the make-up of its citizenry. Aboriginal public governments would represent all residents within a defined territory, whether or not they are Aboriginal. Like other Canadian governments, Aboriginal public governments would be accountable to everyone who is subject to the exercise of their government authority. Aboriginal public governments would differ from non-Aboriginal Canadian governments in that they could accommodate and reflect Aboriginal cultures, traditions and values in all aspects of government. They could have powers that are different from those of comparable non-Aboriginal governments. For example, a regional Aboriginal public government within a province or territory could have jurisdiction in matters normally under the jurisdiction of a provincial government.

In practice, the nature of an Aboriginal government will be determined by, among other things,

- the size of the territory in which the Aboriginal majority exists;
- whether the majority includes one or more Aboriginal peoples or nations;
- whether the public government will be the only government in the territory or will co-exist with other Aboriginal governments instituted on the nation model; and
- the province or territory in which it will operate, which must pass enabling legislation.

We anticipate that Aboriginal public government might assume a variety of forms. Some of these are already emerging, including



- a public government of a northern territory: Nunavut in the eastern Arctic;
- a regional public government of a northern territory: the proposed western Arctic regional government in the Beaufort-Delta region;
- a regional public government in a province: Nunavik in northern Quebec; and
- a community or regional public government in part of a province: resulting from the merging of band and municipal governments or the enhancement of municipal governments serving predominantly Métis communities.

The community of interest model of Aboriginal government is based on the idea that Aboriginal people with ties to different nations, who share common needs and interests arising out of their aboriginality, may associate voluntarily for a limited set of governing purposes. Community of interest governments may evolve from existing institutions currently providing services to non-land-based Aboriginal people, particularly in urban areas. They will differ from existing institutions, however, because of more secure forms of funding than the short-term, project-dependent funding of existing institutions. While services are an important component of the model, these governments and their associated structures and institutions also could assume gradually a broader range of government features and functions.

As with the other two models, several factors will shape the precise form of Aboriginal community of interest governments. These include

- the size of the Aboriginal population and whether the population is concentrated in a particular area,
- urban or rural location, and
- extent of government activities.

While we believe that this is a workable model, certain factors could constrain the viability of community of interest governments or favour alternative forms of government. These factors include

- the need for these governments to be empowered under authority of the federal or provincial governments or by an Aboriginal nation government;
- population thresholds;
- whether economies of scale can be realized in program and service delivery; and
- the presence of other Aboriginal, notably nation-based, governments and initiatives.

The community of interest model is potentially applicable in either an urban or a rural context. However, we believe that it is more likely to be implemented by urban Aboriginal communities of interest. (Details on the urban community of interest model are provided in Volume 4, Chapter 7.)

Two features – the nature of membership and the relationship to a land base – distinguish this model from other forms of Aboriginal government. First, community of interest governments would be formed by and for Aboriginal

### Aboriginal Nation Government

The nation government model is identified by the following key characteristics:

- an identifiable land and territorial base consisting of the nation's own lands and resources (Category I lands) as well as parts of its traditional, treaty and land-use areas (Category II lands), which may be shared with non-Aboriginal governments under co-jurisdiction or co-management arrangements;
- citizenship in the nation as a whole;
- the presence of non-Aboriginal residents on the nation's Category I lands and the protection of their rights;
- the exercise of government powers and authority (for example, law making, administration and interpretation) in a comprehensive range of jurisdictions and, depending on the internal structure of the nation government, possibly by units of government at community, regional or tribal levels;
- the possibility of one or more units of government within the nation, organized centrally or federally;
- internal government procedures that vary from one nation to another and that build upon a nation's traditions;
- the possibility of urban components or extensions of nation government, including extra-territorial jurisdiction and urban institutions; and
- the possibility of relationships with other Aboriginal governments through inter-nation associations such as confederacies, treaty associations and provincial or pan-provincial associations.

people from many nations, and membership would be based on individual choice. Aboriginal community of interest governments would be accountable to these members. Second, although access to and ownership of a land base is a possibility, it is not a distinguishing characteristic of the community of interest model. For example, an Aboriginal community of interest government may own a land base or have access to a land base for cultural purposes, but it will not be organized primarily for governance purposes on that land base, nor will its members be resident or be concentrated on that land base.

Aboriginal community of interest governments are also distinguished from other models in that they exercise a more limited range of powers. For example, Aboriginal people living in a city may come together strictly for the provision of primary or secondary education or other such services.

### Treaty Nation Jurisdiction over Treaty Territory

The Nishnawbe-Aski Nation (NAN) and its member First Nations provide an example of how treaty relationships, as they affect traditional territories currently shared with non-Aboriginal governments and peoples, and regimes of co-jurisdiction and co-management, might be implemented.

NAN wants to engage in negotiations with Canada and the province of Ontario to clarify how jurisdiction and legislative authority will be exercised regarding the traditional and customary lands and resources affected by Treaty 5 and Treaty 9. Through the draft "Framework Agreement on Land, Resources and the Environment" (August 1993) NAN has proposed establishing

- institutions for land and resource management (some would be exclusively First Nation, some might be created to facilitate sharing in the management of lands and resources with Ontario and Canada),
- Nishnawbe-Aski principles and values in the use and care of traditional lands and resources,
- First Nation consent to any development activities within their traditional territories, and
- dispute resolution mechanisms to regulate the exercise of authority by First Nations and other governments within the territory.

*Source:* Nishnawbe-Aski Nation, "Intervention Report to the Royal Commission on Aboriginal Peoples" (1993), Annex L, Draft Framework Agreement on Lands, Resources and the Environment.

### Model 1: The nation model

The nation model of Aboriginal government includes aspects of lands and territory, citizenship, jurisdiction, forms of internal organization, and associated models of inter-Aboriginal government organization.

#### *Lands and territory*

In most cases an Aboriginal nation's relationship with a land and resource base would originate from its concept of traditional territory. A nation would have an identifiable land base composed of the nation's own Aboriginal lands and resources (Category I lands) and parts of the nation's traditional territories.<sup>233</sup>

An Aboriginal nation's own land and resource base would sustain full rights of ownership as well as beneficial use and enjoyment by its citizens. Aboriginal governments would exercise core jurisdiction in most matters affecting their lands, including resource management and allocation, and the lands

### Citizenship Rules Based on Nation Acceptance

The constitution proposed by the Native Council of Nova Scotia for the Mi'kmaq Commonwealth would establish a nation-type government for reserve and non-land-based Mi'kmaq peoples. It contains provisions relating to both citizenship and associated fundamental rights. While self-identification is an important criterion, the constitution also provides for developing a citizenship law incorporating other guiding criteria, including parentage, location of birth, residency, adoption, affiliation and community acceptance. Citizenship in other Indian nations must be relinquished if one is to become a citizen in the commonwealth, and the Grand Council of the Mi'kmaq would have authority to judge individual citizenship cases.

*Source:* Native Council of Nova Scotia, "Mawiwo'kutinej: Let's Talk Together (The Off-Reserve Aboriginal Peoples Perspective)", brief submitted to RCAP (1993).

would be administered in accord with a nation's traditions of tenure and governance. Only an Aboriginal nation would be able to grant rights and interests in these lands and resources. Parts of a nation's traditional territories (Category II lands) are shared with non-Aboriginal governments, and the relationship between Crown and Aboriginal rights and interests is negotiated and reflected in co-management, co-jurisdiction or similar arrangements.

#### *Citizenship*

Aboriginal people may enjoy a form of dual citizenship in their Aboriginal nation and Canada. Citizenship and eligibility for citizenship in a nation would be based on criteria set by the nation's constitution, citizenship law or code, cultural norms, unwritten customs or conventions. The criteria could be applied nation-wide or adapted at the community level or other levels. Persons could be considered eligible for citizenship on the basis of, among other things,

- community acceptance,
- self-identification,
- parentage or ancestry,
- birthplace,
- adoption,
- marriage to a citizen,
- cultural or linguistic affiliation, and
- residence.



### Rights Protection Instruments

The Teslin Tlingit constitution provides that all citizens enjoy rights guaranteed in the Canadian constitution, the *Canadian Charter of Rights and Freedoms*, as well as other rights set out in the constitution, including the right to pursue a way of life that promotes Tlingit language, culture, heritage and material well-being. In exercising law-making powers, the Teslin Tlingit government must observe certain norms and work within parameters designed to protect the individual and collective rights of the Teslin Tlingit Nation.

*Source:* Teslin Tlingit First Nation, "Aboriginal Self-Government and Judicial Systems", research study prepared for RCAF (1995).

As is the case elsewhere, citizens of an Aboriginal nation may also identify with social or political groups within the nation. This identification may be based on clan or family membership or residence in a community or urban area. Some of these other affiliations will have implications for governance and may be reflected in the nation's political structures. Likewise sub-groups, particularly communities within the nation, may have some role in citizenship determination.

The rules governing citizenship would likely incorporate provisions for eligibility, application, enrolment, local community input, and appeal procedures and related structures. The nation's constitution or citizenship law would most likely also identify the circumstances under which the nation would revoke citizenship, whether the nation would permit citizenship in another Aboriginal nation, and associated implications for access to rights and benefits.

In our analysis of citizenship we concluded that a nation's citizenship rules must not discriminate against individuals on the basis of sex, nor can they make ancestry (or blood quantum) a general prerequisite in assessing applications.

Citizenship confers rights, entitlements and benefits upon individuals as well as responsibilities. These rights include civil, democratic and political rights (for example, the right to participate in the selection of leaders), cultural and economic rights (such as the right to pursue traditional economic activities), and rights to social entitlements, such as those flowing from treaties and those in the areas of education, health care, and so on.

Different rights and responsibilities may apply to citizens and non-citizens on Aboriginal lands. For example, cultural rights, or rights to carry on certain economic activities on the nation's lands, may differ for citizens and non-Aboriginal residents on those lands. However, all residents, regardless of citi-

zenship, should have some means of participating in the decision making of Aboriginal governments.

Aboriginal governments may establish charters or other instruments to protect individuals and individual rights from the abusive exercise of power by government. The nation's charter could be an important mechanism to protect, promote and guarantee the fundamental rights and values shared by the people.

The *Canadian Charter of Rights and Freedoms* would protect individual rights as well. However, it would be interpreted and applied flexibly to take into account the particular culture, values, traditions and philosophies of Aboriginal people. Nation governments would have the power to pass notwithstanding clauses under section 33 of the Charter, as explained earlier in this chapter.

### *Jurisdiction and powers*

Aboriginal nation governments will exercise comprehensive government powers and authority in a variety of areas of jurisdiction. They will exercise these powers in respect of all persons resident on their territory. As discussed earlier in this chapter, in some instances these matters will fall within the core area of a nation's jurisdiction and in others within the periphery, thus requiring negotiation and agreement with other governments.

The nature of Aboriginal nation government jurisdiction and its applicability to territory and persons is properly the subject of discussion or negotiation in treaty processes. In general, Aboriginal nations can be expected to exercise jurisdiction of three types:

1. Aboriginal nations exercise paramount authority in core areas of jurisdiction on Category I lands. These matters
  - are of vital concern to the life and welfare of a particular Aboriginal people, its culture and identity,
  - do not have a major impact on adjacent jurisdictions, and
  - are not otherwise the object of transcendent federal or provincial concern.
2. Aboriginal nations exercise negotiated jurisdiction in subject areas falling within the periphery of their jurisdiction on Category I lands, and negotiated authority in regard to Category II lands. In most instances, on Category II shared lands, nation government laws as they affect lands, resources and the nation's citizens would be determined by negotiated co-jurisdictional agreements. Short of an agreement, the rules governing paramouncy in cases of conflict would be guided by the test set out in the *Sparrow* decision.
3. Jurisdiction would be exercisable in a limited way with respect to citizens living outside Category I and Category II lands, including in urban areas. Again, the exercise of this authority in most instances would need to be negotiated and would be subject to voluntary acceptance by those affected. Ideally, negotiated agreements would clarify situations where power is exer-

### Core Jurisdiction

In most of the documentation it has produced since the 1970s, the Federation of Saskatchewan Indian Nations has focused on the powers and jurisdiction of First Nations governments. Exclusive authority in respect of First Nations lands and citizens is asserted in most jurisdictional areas, for example, administration of justice, education, trade and commerce, lands and resources, gaming, taxation, social development, culture and languages, housing, family services and child welfare, hunting, fishing and trapping, citizenship and property and civil rights.

*Source:* Federation of Saskatchewan Indian Nations, "First Nations Self-Government: A Special Research Report", research study prepared for RCAP (1995).

An RCAP case study involving Kahnawake revealed areas in which power would be exercised *exclusively* by Mohawk government and areas in which power might be exercised concurrently or on a shared basis with non-Mohawk governments. Specifically, there was a preference for *exclusive* control in areas such as lands and resources, citizenship, education, infrastructure, justice, taxation and environment, but also some support for power sharing in these areas with other governments (mainly involving administrative and service delivery by these other governments).

*Source:* Gerald R. Alfred, "The Meaning of Self-Government in Kahnawake", research study prepared for RCAP (1994).

cised by both Aboriginal nation governments and non-Aboriginal governments, and normal rules of paramountcy would apply. Agreements would mitigate conflicts and uncertainty by setting out how federal and provincial laws will interact with the laws of an Aboriginal nation government in areas of co-jurisdiction. These agreements may take the form of treaties, co-jurisdictional or co-management agreements, protocols and other intergovernmental arrangements.

In each area of government responsibility, an Aboriginal nation would have powers and authorities in respect of law making (legislative); administration and policy making (executive); and interpretation, application and enforcement of law (judicial).

Law-making powers and authorities normally rest with legislative bodies. They include the development, passage, amendment and repeal of laws, regulations, standards and other legal instruments. These bodies may resemble his-

## Co-Jurisdiction

Most Aboriginal governments today embrace the concept of shared jurisdiction with non-Aboriginal governments, but call for agreements and protocols to set out clearly how the exercise of government powers within each government's respective sphere of jurisdiction will be co-ordinated.

The Siksika Nation anticipates concurrent jurisdiction with other governments. In respect of the province, the management and co-ordination of activities in areas of concurrent jurisdiction will be achieved through a negotiated protocol agreement. Areas where concurrent jurisdiction is to be negotiated include management of lands and resources, environment, traffic and transportation, public works, justice, education, health, and social services. The Siksika Nation emphasizes that it possesses inherent powers in these areas in respect of Siksika Nation lands and peoples. The purpose of negotiations pursuant to the protocol agreement is to establish how provincial powers in these jurisdiction areas are to be practically co-ordinated with Siksika government.

*Source:* Andrew Bear Robe, "The Historical, Legal and Current Basis for Siksika Nation Governance, Including Its Future Possibilities Within Canada", research study prepared for RCAP (1995).

torical structures, existing structures (a council) or government structures common to other Canadian governments (such as a legislative assembly).

The authority to design and deliver programs and services and to establish agencies and other structures for government purposes will likely rest with institutions assigned to administer the day-to-day business of government. These could include executive offices held by individuals (for example, chiefs) or executive bodies (such as councils).

Judicial powers and authority associated with the interpretation, application and enforcement of law, including policing, sentencing, restitution and healing, will rest with the individuals and institutions that the nation entrusts with providing this counsel and wisdom. Elders and women are likely to play a key role in these areas.<sup>234</sup>

## *Internal government organization*

### *Units of government*

Given their diversity, nation governments will differ significantly in terms of how they are organized internally for purposes of self-government. Within a nation there may be several units of government, which might include nation



### Nation Government Jurisdiction in Traditional Territories

The United Chiefs and Councils of Manitoulin view the regulation of fish and wildlife resource use by their own citizens within traditional harvesting areas as an exercise of governance responsibility and stewardship of the resources. They do not advocate exclusive use and management. Under their fish and wildlife initiative UCCM:

- has developed regulations that set out principles for responsible resource use as well as harvesting seasons, methods and procedures and harvester eligibility criteria,
- has established compliance procedures which emphasize prevention, responsibility and enforcement through community sanction, and
- plans to employ conservation officers and engage in conservation projects, monitoring and habitat management.

*Source:* United Chiefs and Councils of Manitoulin, "UCCM Fish and Wildlife Project", brief submitted to RCAP (1993).

or sub-nation units, such as tribes, regions, communities, families or clans. Nations with large and dispersed populations or large traditional territories may include all of these units of government. Smaller nations may operate with only one or two unit levels: community and nation.

Aboriginal nations may organize their units of government on a centralized or federal basis. Under a centralized form of organization, power and authority, including the power to establish community or local governments and assign responsibilities to them, would be concentrated in a single unit at the nation level. A centralized form of organization would likely be least appropriate for Aboriginal nations whose traditional form of political organization is decentralized and informal, or for nations having a widely dispersed and large population. However, it may be appropriate for nations with a concentrated population and land base and a tradition of strong centralized government institutions.

A federal form of government organization would in most cases involve two or more units of government, a nation unit and either community, regional or tribal units. Power would be shared by the units of government. The flexibility of the federal form could accommodate the organizational and administrative needs of Aboriginal nations with large or small, dispersed or concentrated populations and land bases.

Aboriginal nations with large and widely dispersed populations or land bases, and clearly identifiable sub-nation political communities, may wish to adopt federal structures that include political units organized at the provincial or territorial level.

### Metis Nation of Alberta Structures

As proposed by the Metis Nation of Alberta, Métis government would include several levels: community, regional/zone, and provincial. Community constituencies will elect representatives to a Métis provincial-level parliament or legislature.

A provincial-level treasury board composed of an equal number of trustees (who are also legislators) from each of the six regions or zones, appointed by constituency representatives from within that zone, will make budget decisions.

At the executive level a Metis Nation of Alberta president will be elected at large by all Métis people in the province, and will select cabinet members from among the trustees of the treasury board. These members will assume portfolio responsibilities for Metis Nation administrative departments and ministries.

A Métis senate, made up of Métis elders, will have advisory powers and will review all matters before parliament. The senate will resolve disputes between various government structures and officials (for example, between parliament and the president).

*Source:* Metis Nation of Alberta Association, "Metis Nation of Alberta Association Final Report", research study prepared for RCAP (1995).

### *Allocation of jurisdiction through the nation*

Jurisdiction, or specific power to deal with certain matters, may be allocated to different levels of government within the nation. For example, the authority to deliver services and to enforce regulations or certain laws may appropriately be exercised by community-level governments within the nation, while the passage and interpretation of laws for those same matters may be exercised more appropriately at the nation level. Some powers and authority may reside exclusively at the nation level, for example, the authority to conduct intergovernmental relations. Other areas, such as the allocation of interests in local lands and resources, may best be administered at the community level by the people who are most affected by decisions.

The allocation of jurisdictional responsibilities among community (including family/clan), regional, tribal and nation level units of government ideally would be reflected in a nation's constitution. The centralization or decentralization of power would depend on the traditions of the nation as well as the size and distribution of its population. The allocation of jurisdictional authority to government structures outside the nation (such as a confederacy) is discussed later in the chapter.

### Administrative Boards

The Windigo Tribal Council proposes joint First Nation community action through a significantly empowered regional government (Windigo Executive Council) and the development of legislative, policy and administrative capacities on a sector-specific basis.

In order to achieve a separation between political and administrative levels, an executive council, composed of elected chiefs and councillors of individual First Nation communities and an administration and management board, would be established. This board, on a sector-specific basis, would negotiate the takeover or establishment of new programs and services. Within each sector, other management structures, including boards and technical committees, would be established at First Nation, tribal council, and inter-governmental levels with specific responsibility for the development, administration and management of sectoral activities.

*Source:* Windigo First Nations Council, "Proposal for Regional Governance in the Windigo First Nations Area", brief submitted to RCAP (1993).

### *Legislative, executive and judicial branches*

Aboriginal nation governments will exercise legislative, executive and judicial powers and authority for the purpose of making, implementing, interpreting and enforcing laws. A nation government's constitution would establish institutions to carry out these activities. They may reflect the traditional forms of organization or contemporary adaptations. Examples of legislative structures include councils, assemblies, congresses, senates, elders councils and clan leaders. Examples of executive structures include chiefs, councils, chairpersons and presidents. Examples of judicial structures include justice circles, judicial councils, peacemaker courts, healers and tribunals.

### *Administration and delivery of programs and services*

Nation governments will also establish administrative agencies and institutions. These may assume a variety of forms, including departments, ministries, boards, corporations, societies or associations, and would represent varying levels of autonomy and accountability.

On Category 1 lands, a nation, and in some instances community government structures, will deliver programs and services to its resident citizens and to residents who are non-citizens. Arrangements for the delivery of programs and services to non-Aboriginal residents on Aboriginal lands would follow from financial arrangements with non-Aboriginal governments. Outside its Category 1

### Teslin Tlingit Government

The Teslin Tlingit Nation in Yukon is restoring its traditional system of government, particularly in the area of leadership and decision making, with some contemporary adaptations. Teslin Tlingit government is clan-based. The five Tlingit clans determine who is a member, select leaders and assume government-type responsibilities in respect of clan members.

The Teslin Tlingit are building upon the family at the level of the nation through the establishment of several branches of government, including a general council (legislative branch), executive council, an elders council and a justice council. While these councils are not exact duplicates of traditional Tlingit institutions, they do reflect structurally the tradition of maintaining balance within the community through the five clans. For example, the general council comprises five representatives from each clan. Decision making is by consensus, but requires a quorum including at least three members from each clan. Similarly, each clan leader has a seat on the executive council, and the justice council comprises the five clan leaders. Each clan has its own court structure called a “peacemaker court”.

*Source:* Teslin Tlingit First Nation, “Aboriginal Self-Government and Judicial Systems”, research study prepared for RCAP (1995).

Aboriginal lands, where feasible, a nation may extend its programs and services to its citizens through extension programs, special agencies or institutions operating off the Aboriginal land base, or through co-management or co-jurisdiction arrangements negotiated with other governments.

#### *Internal government procedures*

Internal procedures of government include rules for leadership selection and representation in government agencies and boards, decision-making bodies and related administrative systems that enhance the accountability of institutions of government. There will be many ways for Aboriginal nations to conduct their internal affairs. In some instances these will draw upon a nation’s traditions. In others they may synthesize traditional, non-traditional and non-Aboriginal government procedures. We suggest a few possibilities in the paragraphs that follow.

Leaders and officials may be selected according to a nation’s traditions or by those traditions adapted to a contemporary context. Leaders may be elected or otherwise selected from the citizenship at large, or from groups of citizens such as clans, families or urban constituencies, each of which may have its own par-



### Accountability Processes

For Shubenacadie (Indian Brook), a First Nation community in Nova Scotia, the accountability of government institutions, leaders and officials is important. Accountability is defined in terms of council's responsiveness to and operation for the benefit of community members.

Suggestions for improving band council accountability made by community members are pragmatic. They suggest various measures to be taken by the community and its leadership through a process of community review and adjustment. For example, suggestions include open council meetings, improved systems for communicating community concerns and council decisions such as newsletters, home visits by political leaders, and increased involvement of members through committee structures.

*Source:* Jean Knockwood, "The Shubenacadie Band Council and the Indian Brook Band Case Study on Self Governance", research study prepared for RCAP (1993).

tical selection processes. Leaders may be selected by procedures that assign special roles to elders or women or according to hereditary systems. Others, like the Métis Nation, may adopt a ballot-box approach to leadership selection.

Alternatively, representation may be achieved through councils, boards and assemblies composed of representatives who hold public office in other units of government. For example, community chiefs may also sit as representatives at national or regional-level councils or assemblies.

Decision-making processes will likely differ among nations and among the various units of government within nations. Decision making at the community level may be structured to achieve the broad participation of all community members, including families, clans, elders, youth and women. Community decision-making processes may be vote-based or consensus-based, or may be rooted in a combination of traditional and non-traditional methods. Some decisions may be made by a community government structure, such as a council, while other decisions, especially in matters of broad community interest, or affecting collective interests and well-being (such as those that affect a nation's lands and resources), may require the consideration of the whole community. On a day-to-day basis, decision making at regional, tribal and nation levels would likely be carried out directly by representative leaders and would be vote- or consensus-based.

Accountability of Aboriginal nation government will be determined primarily by processes rather than by structures and institutions. Such processes may mirror Aboriginal governing traditions. They may also replicate accountability measures common to Canadian governments. For example, these might include

- financial and operational reporting regimes (possibly based on statutes);
- clear and transparent administrative policies, procedures and operations (including administrative decision-making procedures);
- a code of ethics for public officials;
- conflict of interest laws or guidelines;
- access to information procedures;
- the development of communication systems to keep citizens informed; and
- the establishment of procedures to deal with individual or community grievances.

### *Constitution*

The internal structure and authority of a nation government and its various units of government would be reflected in a constitution, charter, law(s) and in unwritten conventions that reflect the nation's cultural norms and social and traditional values. The elements of such constitutions could include

- a statement of values, beliefs, principles;
- a description of units or levels of government and associated legislative, executive and judicial structures, written procedures (for example, for selecting officials, leaders and representatives to decision-making bodies), and definitions of jurisdictions, powers and authority;
- criteria, and application and appeal procedures for citizenship;

### **Extra-Territorial Jurisdiction**

Precedents for the exercise of extra-territorial jurisdiction exist in the Yukon. While not confined to urban areas, First Nations, pursuant to their individual self-government agreements, may enact laws in respect of their citizens for

- programs and services for spiritual and cultural beliefs and practices;
- provision of programs and services in Aboriginal languages;
- aspects of health care, social and welfare services;
- training programs;
- most aspects of care, custody, adoption and placement of the First Nation's children;
- marriage; and
- dispute resolution services.

See, for example, "First Nation of Nacho Nyak Dun Final Agreement between the Government of Canada, the First Nation of Nacho Nyak Dun and the Government of the Yukon", 1992.

- provisions regarding lands, resources and the environment;
- individual and collective rights protections; and
- procedures for amending the constitution.

### *Urban extensions of Aboriginal nation government*

The authority of an Aboriginal nation government authority has both a territorial and a communal character (see the section on visions of governance earlier in the chapter for an elaboration of these terms). Its exercise can be in respect of a particular territory (for example, an Aboriginal land base) or in respect of persons (for example, citizens, whether or not they live on Aboriginal lands). Aboriginal nation governments may also extend their government activities and authority to their citizens living in urban areas. In all cases, however, urban Aboriginal citizens' participation in such governance initiatives will be voluntary, based on individual choice and consent. Urban extensions of an Aboriginal nation government might take the form of

- extra-territorial jurisdiction,
- host nation,
- treaty nation government in urban areas, or
- Métis Nation government in urban areas.

Each of these approaches is considered in greater detail in Volume 4, Chapter 7.

#### *Extra-territorial jurisdiction*

The extra-territorial jurisdiction approach will likely be of greatest interest to Aboriginal nation governments that wish to extend government activities to urban citizens living outside the nation's Category 1 lands. They might extend services through urban service delivery programs, agencies or institutions established and operated by the nation or by the nation's urban citizens under the nation government's authority. Another possibility is to establish separate urban political institutions (for example, urban councils) or to represent the urban constituency in the nation's main political structures (for example, through urban councillors).

A nation could extend the application of the nation's laws to urban residents who choose to be subject to them, in matters described in a treaty or self-government agreement (for example, child welfare, marriage, health, education, language and culture). Finally, a nation could contract with other urban service delivery agencies and institutions on behalf of urban citizens to have these agencies provide programs and services to the nation's citizens.

#### *Host nation*

Acting as a host nation, Aboriginal nations would have rights and responsibilities having to do with citizens of other Aboriginal nations living in urban

areas within the traditional territories of the nation who choose to participate in the host nation's urban governance activities. In an urban area, an Aboriginal nation government would most likely confine its activities as host nation to program and service delivery.

### *Treaty nation government*

Treaty nations may singly or jointly establish centres in urban areas to deliver services and treaty entitlements. The authority to deliver programs and services to treaty people in urban areas would be delegated by participating treaty nations to the centres. These institutions need not be empowered by a particular Aboriginal nation government but could be a common governance concern of several treaty nations – whether or not they are signatories of the same treaties.

### *Métis Nation government in urban areas*

The Métis Nation has advocated the development and operation of urban institutions to serve urban Métis residents. Some Métis Nation government proposals anticipate a local or community level of Métis government integrated with provincial, regional and national Métis government bodies. This model of local government would include urban areas with Métis populations. Urban Métis locals, as governments, would have responsibilities in areas such as education, training, economic development, social services and housing. They would deliver programs and services organized at the provincial or national level of the Métis Nation or their own programs.

## Historical and Contemporary Confederacies

The Haudenosaunee Confederacy provides an example of a traditional confederacy. It incorporates five distinctive though linguistically related nations of people (the Mohawk, Onondaga, Oneida, Cayuga and Seneca nations). The Covenant Circle of wampum represents the 50 chiefs (*rotiianeson*) of the five nations and the peace, balance and security that are achieved for all through the mechanism of the confederacy.

The Nishnawbe Aski Nation (NAN) embodies a newer confederal arrangement. It involves the participation of Cree, Ojibwa and Oji-Cree First Nation communities in northern Ontario. NAN has developed an extensive infrastructure for program and service delivery in areas such as education, justice and health. It has also established political structures to oversee all activities jointly undertaken by the members.



### Aboriginal Public Government

The public government model expresses self-determination through an Aboriginal-controlled public government rather than an Aboriginal-exclusive form of self-government. It is identified by the following key characteristics:

- government over a geographic territory, coinciding with an existing or new government administrative jurisdiction, a treaty area or a comprehensive claims settlement area;
- a constituency of residents that includes Aboriginal persons possessing Aboriginal and treaty rights in Canada, as well as non-Aboriginal people;
- jurisdiction in areas considered important by residents and that may include a mix of comprehensive powers and authority;
- the establishment of legislative, executive and judicial structures of government and internal government procedures broadly similar to those of other Canadian governments, but that may be adapted to reflect Aboriginal customs, culture and traditions;
- the possibility of relationships with other units of government operating within a public government framework;
- the possibility of relationships with other Aboriginal governments; and
- the use of internal government procedures broadly similar to those of other Canadian governments, adapted to reflect Aboriginal traditions

#### *Associated models of inter-Aboriginal government organization*

Several nations may join together to establish a confederacy or similar type of political alliance or supra-nation government organization. These may reflect historical alliances (for example, the Haudenosaunee, Wabanaki or Blackfoot confederacies) or new alliances that take into account relationships that have evolved between Aboriginal peoples in more recent years. Confederacies may be established to

- maintain treaty relations with federal and provincial governments;
- further political purposes, such as advocacy;
- carry out intergovernmental tasks such as regulating land and resource use in shared traditional territories (Category II lands); and
- carry out administrative tasks, such as program and service delivery.

Some nations may be too small to sustain a broad range of government activities, especially in program and service delivery. More effective service delivery may be achieved when several nations pool their resources through co-operative intergovernmental arrangements.

### Administration of Lands and Resources

Inuit proposals for Nunavik, a regional public government in northern Quebec, would see the establishment of administrative departments (such as the department of environment, lands and resources proposed in the Nunavik constitution) to implement Nunavik government legislation and policy.

Government action would strongly reflect Inuit relationships with their traditional land and resource base, and Inuit rights would ultimately be protected through a Nunavik charter. For example, this charter would recognize Inuit priorities in harvesting wildlife subject only to principles of conservation.

*Source:* Marc Malone and Carole Lévesque, “Nunavik Government”, research study prepared for RCAP (1994); see also Nunavik Constitutional Committee, “Constitution of Nunavik”, 1991.

#### *Structures*

Nations with continuing associations may establish joint political and administrative structures, including councils, assemblies, administrative agencies, boards or institutions. For example, a group of nations, through a confederal organization, may set up a post-secondary education facility.

#### *Jurisdiction*

Based on our opinion that the right of self-determination and the right of self-government reside primarily with nations, we believe a confederacy would need to be empowered by participating Aboriginal nations. They would have to delegate or transfer to the confederacy and its political and administrative institutions jurisdiction and associated powers and authority. Jurisdiction and associated powers to be delegated to a confederacy may be limited (for example, the administration of selected programs) or comprehensive (for example, making and enforcing laws in a range of subject matters including education, health, taxation, lands and resources).

### Model 2: The public government model

The public government model of Aboriginal government includes aspects of lands and territory, citizenship, jurisdiction, forms of internal organization, and the relationship with other Aboriginal governments.

#### *Lands and territory*

Public governments exercise jurisdiction over a geographically defined territory. The territorial boundaries of the public government may coincide with or encompass

### Rights Protections in a Public Government Context

Reporting in 1993, the Northwest Territories Commission for Constitutional Development (the Bourque commission) proposed a constitution for a new western territory, Nunavut, incorporating public, Aboriginal and mixed governments. The commission recommended affirmation of the rights and freedoms set out in the *Canadian Charter of Rights and Freedoms*. It also recommended recognition and protection of the rights of First Peoples, including the inherent right of self-government; the status of Aboriginal languages as official languages; the right of Aboriginal First Nations to opt out of a new western territory and pursue direct relationships with the federal government; and affirmation, recognition and protection of treaty rights, Métis rights and the rights of First Nations that have already entered into modern land claims agreements.

Source: Linda Starke, *Signs of Hope: Working Towards Our Common Future* (Oxford: Oxford University Press, 1990).

- an existing administrative territory such as a region or northern territory, a northern regional municipality, improvement or similar administrative district, a municipality, town, hamlet or village;
- a treaty area or comprehensive claims agreement settlement area; or
- the traditional territory of an Aboriginal nation.

Within the territorial boundaries of the public government, land is likely to be organized according to the three categories of land referred to earlier. (These categories are described further in Chapter 4.)

Category I lands are Aboriginal lands held and controlled by the Aboriginal nation or nations participating in the public government. Category II lands are shared lands encompassing parts of the traditional Aboriginal territories over which the Aboriginal public government will exercise jurisdiction shared with other Canadian governments and possibly with other Aboriginal nation governments in accordance with negotiated arrangements. Category III lands are Crown lands and privately held lands.

Treaties to be made between the Aboriginal peoples who reside in the territory and Canadian governments will deal with self-government, lands and resources, and federal or provincial legislation required to establish a public government. They will determine what jurisdictional regimes apply to the three categories of land within the public government's territory.

### Regional Public Government Jurisdiction

A research study on Métis self-government in Saskatchewan suggested that Métis communities in the northern parts of the province may be in a position to exercise a range of government powers through a Métis-controlled regional public government. As proposed, the authority of this government might encompass provincial-type responsibilities; for example, lands and resource management, fire control, highways, health, education, justice and economic development.

*Source:* Clement Chartier for the Metis Family and Community Justice Services Inc., "Governance Study: Metis Self-Government in Saskatchewan", research study prepared for RCAP (1995).

The draft constitution of Nunavik proposes authority in areas normally within the purview of federal and provincial governments, including lands, education, environment, health and social services, public works, justice, language, offshore areas and external relations.

*Source:* Nunavik Constitutional Committee, "Constitution of Nunavik", 1991.

### *Constituency of residents*

A public government would be organized to serve a constituency of residents, including Aboriginal and non-Aboriginal people who live within a defined territory. The Aboriginal residents may be from different Aboriginal nations and backgrounds.

The Aboriginal public government model differs from non-Aboriginal public governments in that the rights of residents may be differentiated to allow the Aboriginal majority to retain constitutionally protected Aboriginal and treaty rights, including the right of self-government. Aboriginal residents may have certain exclusive economic rights, for example, in renewable resource harvesting activities. Aboriginal residents may have the right to own, use, regulate and enjoy specific cultural property, and to promote and protect Aboriginal heritage, culture, language and traditions. Both Aboriginal and non-Aboriginal persons may have to prove they are residents to establish their eligibility to stand for government office or leadership positions.

Aboriginal or treaty rights that limit a public government's power may be reflected in a treaty, a comprehensive claims settlement or a similar agreement. Both shared and differentiated rights of Aboriginal and non-Aboriginal citizens would be set out in a constitution or laws of the public government.



The *Canadian Charter of Rights and Freedoms* and provincial charters or human rights codes, where appropriate, would apply to Aboriginal public governments. Charters may be developed to reflect Aboriginal values and the Aboriginal realities of public government, and to protect and promote the specific rights and interests of the Aboriginal residents.

### *Jurisdiction, powers and authority*

Powers and authority in a variety of areas will be variously recognized, transferred, devolved or delegated to Aboriginal public governments by other Canadian governments. The jurisdiction of Aboriginal public governments will almost certainly differ from that of comparable non-Aboriginal governments. For example, local Aboriginal governments in some areas might have enhanced municipal jurisdiction to deal with provincial areas of jurisdiction (for example, lands and

### **Federal Forms of Organization**

The Bourque commission proposed a federal form of government organization for the western Northwest Territories. Two distinct levels of government, a district and central government, would coexist, each with its own constitutionally protected sphere of authority, law-making capacities and structures of government.

*Source:* Commission for Constitutional Development (the Bourque commission), "Phase I Report: Working Toward a Common Future" (Ottawa: Supply and Services, 1992).

Reflecting the principle of subsidiarity, proposals for a western Arctic district government encompassing Inuvialuit, Gwich'in and mixed Aboriginal/non-Aboriginal communities describe the relationship between regional and community levels of government as follows:

The proposed regional government will have no legislative powers in fact unless and until the communities, through representatives in the regional assembly, wish to confer a given power upon the regional government. The legislation creating the regional government...is simply enabling legislation to empower the regional assembly...to legislate. Thus, the proposed new regional government should properly be considered as empowering communities.

*Source:* Inuvialuit Regional Corporation, "Inuvialuit Self-Government", research study prepared for RCAP (1993).

### Representation in the Western Arctic Regional Government

Proposals for this government anticipate a regional council composed of eleven councillors. One would be elected from each of the participating Inuvialuit and Gwich'in communities, two elected at large from each of the Beaufort and Delta areas, and a mayor would be elected at large from within the region.

*Source:* Western Arctic Regional Government, "Inuvialuit and Gwich'in Proposal for Reshaping Government in the Western Arctic", 1994.

resources, environment, education, social affairs, administration of justice). Even some federal areas of jurisdiction (for example, migratory birds) might logically be dealt with by local and regional governments.

The objective is to ensure that the public government is sufficiently empowered to support Aboriginal peoples' aspirations in economic, cultural, social and political spheres, and to protect all residents' civil and political rights. The section on self-government identifies core areas of regional jurisdiction, as well as matters that might be considered to fall within the periphery of Aboriginal nation government jurisdiction. The types of jurisdiction that might be exercised by a local or community form of public government would have to be negotiated, and would be delegated by another government (for example, the Aboriginal, provincial or federal government). Aboriginal-controlled local public governments might be permitted to exercise authority different from that normally assigned to comparable municipal governments. For example, they might receive delegated authority to regulate certain hunting, fishing and trapping activities, subjects normally within the purview of the province.

Like Aboriginal nation governments, Aboriginal public governments can be expected to exercise the law-making, judicial and executive powers of government. The way these powers are exercised, and the structures that administer them, can reflect Aboriginal traditions and cultures.

### *Internal government organization*

#### *Units of government*

Aboriginal public governments may operate at community, regional or territorial levels. They may incorporate one or more units of government. The relationship between regional or territorial units differs according to whether the units are organized centrally or federally.

Under a centralized form of government, powers and authority, including the power to establish, empower and legislate in respect of other orders of gov-

### Intergovernmental Arrangements

In a report to the Northwest Territories Constitutional Steering Committee in 1994, the Dogrib Treaty #11 Council described the type of arrangements that might exist between Dogrib and public government institutions. It suggested that such relations would take place in a framework of negotiated inter-governmental agreements, inter-delegation of powers and sharing of resources.

*Source:* Constitutional Development Steering Committee (N.W.T.), "Summaries of Member Group Research Reports" (Yellowknife, N.W.T.: Constitutional Development Steering Committee, 1994), p. 32.

ernment, may be concentrated in one central unit of government. This is the case, for example, in the newly established territory of Nunavut.<sup>235</sup> A centralized form can be implemented in a regional public government when there is a history of co-operative action among the communities and they decide to form a new government such as Nunavik in northern Quebec.

Under a federal form of organization, two or more units of government, most likely regional and local governments, would coexist in the public government framework. Jurisdiction would be divided among them. Each level of government would be autonomous within its respective field of jurisdiction. This form of organization may be appropriate where communities want to exercise powers and authority in respect of specific matters, rather than have these rest with a regional or territorial government.

A public government may also be organized federally according to the principle of subsidiarity.<sup>236</sup> Under this arrangement, a regional public government might be set up and controlled by other participating governments, including community and Aboriginal nation governments. A regional government may have its own powers and authority, but for the most part it would exercise these at the discretion and according to the will of participating governments. Through the regional government, participating governments would pursue common interests and objectives, for example, in program and service delivery. Organization on the basis of subsidiarity works well where diverse communities benefit by participating in regional alliances for some but not all government purposes.

#### *Allocation of jurisdiction among units of government*

Like Aboriginal nation government, Aboriginal public governments may include more than one level of government. As with the Aboriginal nation government model, some authority may be exercised more appropriately at the community level (for example, program and service delivery), while others

(such as program and service design, and law and policy making) may rest at regional or territorial levels of the public government.

### *Legislative, executive and judicial structures*

Aboriginal public governments will include legislative, executive and judicial branches, although the form these take may be influenced by the traditions, values and cultures of the Aboriginal people who control the government. Public governments will also establish administrative agencies and institutions to carry out government business.

### *Internal government procedures*

Internal procedures include rules for leadership selection, representation in government agencies and boards, decision making and other activities to enhance government accountability. Aboriginal public governments may wish to adopt the procedures of other Canadian public governments. They may also adapt procedures to reflect the culture, values and traditions of Aboriginal peoples participating in the public government.

Leaders most likely will be selected through electoral processes. Representatives to regional or territorial legislative bodies may be the leaders of community governments, or directly elected representatives. In some instances it may be desirable to have some combination of the two approaches. Members of executive bodies may be elected, for example, through at-large elections for specific offices, or selected from representatives to the legislative body.

Decision-making processes may reflect Aboriginal traditions of consensus or may be based on majority vote. Regional and territorial public governments may carry out government responsibilities and activities through sector-specific departments, ministries, public corporations and related government agencies. Internal government procedures, administrative systems and the corporate culture of government institutions may reflect Aboriginal traditions, values and ways. Many of these adaptations might not be readily apparent on the surface of the government's operations. Aboriginal public governments would be accountable to all residents. The form of accountability, like that of nation-based governments, in part reflects traditional Aboriginal customs and in part measures common to mainstream Canadian government.

### *Constitution*

Various features of an Aboriginal public government may be formally described in instruments such as the constitution (where specifically created), or in agreements (treaties, comprehensive claims agreements). Characteristics of the government may also be formalized in the legislation of another Canadian government that recognizes or enables the public government. For example, the *Nunavut Act* was passed by Parliament permitting the establishment and implementation of the Nunavut government and legislative assembly. The elements



### Aboriginal Community of Interest Government

The community of interest model of Aboriginal government is an Aboriginal-exclusive form of government of a group of Aboriginal people who associate voluntarily. It does not operate on the basis of the inherent right of self-government, but rather has self-governing authority delegated by an Aboriginal nation government or by federal or provincial governments. It has the following key characteristics:

- it operates within territorial limits but without jurisdiction over a territory or land base, although the acquisition of land is not precluded;
- its membership includes individuals of different Aboriginal heritage who choose to be members, and who may or may not pursue an affiliation with their home nations;
- its powers and authority have been delegated to it in a limited range of jurisdictions or matters concentrated on program and service delivery in areas of importance to its members;
- in most cases, it has a single level of government organization, with government operations conducted through institutions and agencies;
- it has some decision- or rule-making authority and a dispute-resolution mechanism; and
- it may act as a service delivery agency for other Aboriginal governments.

that would be included in each of these instruments are similar to those described for Aboriginal nation government constitutions.

#### *Relationships with other Aboriginal governments*

An Aboriginal public government might establish formal and working relationships with other Aboriginal governments in two situations: when the boundaries of an Aboriginal nation and an Aboriginal-controlled public government are contiguous, and when Aboriginal communities of interest operate in urban areas located in its territory. In either case, intergovernmental arrangements, including co-jurisdiction and co-management, might be established to deal with lands and resources, environmental matters and program and service delivery (for example, in the areas of health, education, justice, public services and infrastructure).

### Model 3: The community of interest model

The community of interest model of Aboriginal government deals with aspects of lands and territory, citizenship, jurisdiction, forms of internal organization, and the relationship with other Aboriginal governments.

### Participation in Land and Resource Management

A community of interest government, in agreement with a provincial government, may have access to a specific area of unoccupied Crown land. It may operate educational and cultural centres or programs or manage resources on the land base (for example, forests). Access to the land and resource base would be permitted even if it is not being used primarily for residential purposes.

#### *Lands and territory*

Community of interest governments are not land-based or territorial. The model is not based on exercising jurisdiction over an Aboriginal land base or territory. However, such governments may operate within a clearly defined geographic area. This area may be determined by the dispersion or concentration of the government's membership, or by its location in a rural or urban area. For example, governments may operate within the boundaries of a city, town or municipality, while non-urban community of interest governments may operate province-wide or within a region defined by other means. The model is distinctive because it is not primarily land-based either in terms of the location of its membership or its jurisdiction. However, a community of interest government may own or hold land or be involved in land and resource co-management projects. (Co-management, as it pertains to urban communities of interest, is considered in Volume 4, Chapter 7.)

A land base or access to one may be acquired by a community of interest government for the following purposes:

- cultural, spiritual or educational
- institutions (including schools and offices)
- housing
- economic development and revenue generation.

#### *Membership*

Membership in the government is based on Aboriginal identity and voluntary affiliation. It consists of individuals (or families) of Aboriginal heritage, who may or may not have emotional, familial, cultural, political or other affiliations with a particular nation.

Such a government could have the authority to establish membership rules and to determine the criteria to assess a person's affiliation with an Aboriginal people. Individuals might be eligible for membership on the basis of

- self-identification as an Aboriginal person;
- claims of affiliation with, or citizenship in, an Aboriginal nation; or
- documented evidence of affiliation with an Aboriginal people or nation.

We believe that community of interest governments and nation governments should allow individuals to retain citizenship in an Aboriginal nation as well as being members of a community of interest government.

Depending on the structure and purpose of the government, membership rights and entitlements may be limited primarily to political rights (for example, the right to stand for executive office) and to social, economic and cultural rights (for example, entitlement to programs and services delivered by the government).

The *Canadian Charter of Rights and Freedoms* and provincial, territorial and appropriate Aboriginal charters would apply to community of interest governments.

### *Jurisdiction and powers*

Unlike Aboriginal nation and public governments, a community of interest government would not exercise the right of self-government unless it is one of the communities of a specific Aboriginal nation, nor would it have comprehensive

## Community of Interest Proposals

The Native Council of Prince Edward Island has proposed a non-urban variant of the community of interest model. Their draft recognition act provides for the registration of members in accordance with a by-law to be developed by the governing council. The by-law would require documented evidence of descent from one of the Aboriginal peoples of Canada defined in the *Constitution Act, 1982*. Associated "rights and obligations" of membership would be spelled out in a by-law.

*Source:* Native Council of Prince Edward Island, "Report on Self-Government Structures for Micmacs Living Off-Reserve in Prince Edward Island", brief submitted to RCAP (1993).

The Aboriginal Council of Winnipeg proposes to extend membership to Aboriginal people in the city of Winnipeg. As proposed in its draft constitution, an Aboriginal person is defined as "any person whose ancestral beginnings or roots can be traced, in full or in part, to the first inhabitants of North America".

*Source:* Linda Clarkson, "A Case Study of the Aboriginal Council of Winnipeg as an Inclusive Status-Blind Urban Political Representative Organization", research study prepared for RCAP (1994).

powers. Jurisdiction and authority will be limited and will be assigned, delegated or transferred by other Canadian and Aboriginal governments. Under such arrangements, authority may be transferred on a sector-specific basis.

Areas in which these governments are likely to be active include those with a human focus, for example,

- education, culture and language,
- social services,
- child welfare,
- housing, and
- economic development.

Areas in which they are likely to have less involvement include those with an infrastructure or land base focus, for example lands, resources, environment, aspects of the economy (for example, wildlife management), public infrastructure and services, and communications.

Aboriginal community of interest governments may exercise their jurisdiction exclusively for their members in accordance with arrangements that

### Program and Service Delivery

Aboriginal peoples want more control over how programs and services are delivered to their citizens. Current co-management type regimes permit varying levels of Aboriginal involvement in design, development and delivery of programs and services. However, such involvement must occur within the parameters of provincial or federal government legislative or policy regimes.

In delivering programs to a mixed Aboriginal constituency, the New Brunswick Aboriginal Peoples Council envisions short-term co-management arrangements and the gradual assumption of greater government powers and self-sufficiency over the longer term.

As Aboriginal self-government becomes a reality, it will be the responsibility of the government to formulate, initiate and maintain programs and services for its constituency. The NBAPC, as such a government, would design programs to meet the needs of the membership and conduct objective research. Program design and delivery would involve contemporary management methods coupled with traditional techniques, which will be used as guidelines for all programs.

*Source:* New Brunswick Aboriginal Peoples Council, "Aboriginal Self Governance Within the Province of New Brunswick", research study prepared for RCAP (1995).



result from a delegation of power. Alternatively, they may exercise devolved or delegated jurisdiction on behalf of other governments (federal, provincial, other Aboriginal) in specific service delivery sectors (for example, education, health). These areas would likely involve negotiated co-management arrangements. They also may deliver the programs and services of other governments under service delivery agreements.

Community of interest governments will engage primarily in by-law, rule and policy making, and exercise administrative powers and authority. It is also possible that a government would administer justice services and enforce its own by-laws, as well as the laws of other authorities, according to agreement.<sup>237</sup>

### *Internal government organization*

Given that they fulfil a limited set of functions, these governments will not have all the organizational features of other governments. In general, the size of the government and its associated organization would correspond to the range of activities being undertaken. The more limited and focused its functions and activities, the less political and administrative infrastructure will be required.

#### *Units of government*

Community of interest governments likely will be organized with only one level. This form of organization is most appropriate for urban or non-urban areas where the participating Aboriginal population is fairly concentrated.

An organization of more than one level would be less common but appropriate for non-urban Aboriginal communities where the population is dispersed but can be organized in local or regional associations or communities. As discussed previously, two or more levels of government can be organized according to centralized or federal principles.

#### *Structures of government*

Community of interest governments for the most part would not have a full set of government structures. Executive and legislative functions likely will be fused in one body (for example, an elected executive council). However, if the community of interest is large enough, and government responsibilities are comprehensive, a legislative body may be established with representation drawn from local or regional associations or participating institutions and agencies. The executive could be a subset of the members of the legislative council, or could be separately selected.

Most community of interest governments will carry out their government responsibilities and activities through sector-specific agencies and institutions. These institutions may be fairly autonomous, enjoying an arm's-length relationship with political bodies and having their own boards. Alternatively, the government may elect to establish tight control over them and make them administrative branches of the government.

## Nation Governments and Community of Interest Governments

The need for co-operation between nations of origin and urban communities of interest was noted by the Native Council of Canada. It suggested that urban governments representing Aboriginal people of different heritage

need [not] be at the expense of tribal or national distinctions, any more than it would to clan or other collective distinctions that cut across and link national and local identities....Regimes for dual citizenship can be developed, as indeed they now exist internationally. Membership in an urban government need not and should not imply loss of citizenship in a nation, clan or family.

*Source:* Native Council of Canada, "The National Perspective", Book 1 in *The First Peoples Urban Circle: Choices for Self-Determination* (Ottawa: Native Council of Canada, 1993), p. 17.

### *Internal government procedures*

Internal government procedures relating to the selection of leaders, decision making and accountability would be set out in the government's constituting document.

Leadership selection and decision-making procedures would be determined by several factors, including the homogeneity of the population and the functions served by the government. As a non-traditional form of Aboriginal government, involving individuals from diverse Aboriginal traditions, leadership selection is likely to be by election, although other methods should not be precluded. Decision making may be by majority vote or consensus. Accountability to the community served may be enhanced by procedures similar to those described for Aboriginal nation and public governments.

### *Constitution*

The community that associates for purposes of pursuing this form of government will determine the scope, functions, structure, institutions and procedures of that government. These characteristics might be described in a constituting document, which would be recognized or given effect by another government's legislation, delegating powers to the community of interest government.

### *Relationships with other Aboriginal governments*

Since Aboriginal community of interest governments will include individuals from different nations, relations with Aboriginal governments, especially nation

governments, will be significant. Aspects of inter-Aboriginal government relations might include

- service delivery arrangements to provide services to citizens of the nation who reside in areas where the community of interest government operates;
- co-operation in program and service delivery in specific sectors (for example, post-secondary education, justice initiatives, and health facilities); and
- co-operation for the purpose of political advocacy and to pursue relations with Canadian governments at a municipal, provincial, territorial or national level.

Community of interest governments will also enjoy significant relations with municipal governments, notably in urban areas. These will likely require establishing formal agreements for program and service delivery in certain sectors, and establishing associated structures (such as committees and councils) to facilitate communication and consultation. In Volume 4, Chapter 7, we explore some possibilities for reforming existing government authorities and structures in urban environments in consideration of Aboriginal perspectives and interests. Such reforms could also entail establishing joint structures to co-ordinate activities and agreements with urban Aboriginal community of interest governments.

## Conclusion

We have considered three models of Aboriginal governance that might be developed to meet the aspirations of Aboriginal peoples in Canada. These approaches do not exhaust the possibilities for Aboriginal self-government and self-determination.

The nation government model provides a largely autonomous form of governance for Aboriginal peoples who choose to exercise their collective self-determination around the principles of a nation with a defined citizenship base. However, nation government requires a certain amount of aggregation on the part of an Aboriginal people and associated communities, either to reinstate traditional nation affiliations and confederacies or to create new ones, and to sustain an adequate citizenship and resource base for the practical implementation of self-government.

For some Aboriginal peoples and nations, leadership and control over public governments in their traditional territories represent an effective route to self-determination and provide a vehicle for protecting, promoting and exercising Aboriginal and treaty rights. This form of government may result in Aboriginal peoples or nations controlling territorial or regional public governments through law-making, executive and judicial powers in much the same way as nation governments do.

Community of interest governments provide an inclusive and practical response to the needs of Aboriginal people who, while they may not share the same Aboriginal group origin, do have a shared sense of identity arising from their

common experience in urban and other areas. Where nationhood is not an issue, these governments may provide a meaningful and effective way for individuals and groups to protect and preserve the essential elements of their aboriginality that might otherwise be threatened by time, distance and other circumstances. Affiliations with Aboriginal nation or public governments may provide opportunities for mutually beneficial arrangements, such as shared program delivery.

We emphasize again that these models of Aboriginal government should not be considered either exhaustive of the possibilities, mutually exclusive or static in time. We have presented them here as suggestions of possible forms of Aboriginal governments. Governance, like nationhood, has a dynamic character. Should Aboriginal peoples choose to follow one or another of these paths to Aboriginal government, depending on their geographic situation, we anticipate that the outcomes will be as richly diverse as the traditions, aspirations and experiences of Aboriginal peoples in Canada.

## RECOMMENDATIONS

### The Commission recommends that

#### Territorial and Communal Forms of Government

#### 2.3.13

All governments in Canada support Aboriginal peoples' desire to exercise both territorial and communal forms of jurisdiction, and co-operate with and assist them in achieving these objectives through negotiated self-government agreements.

#### Establishing Governments

#### 2.3.14

In establishing and structuring their governments, Aboriginal peoples give consideration to three models of Aboriginal government – nation government, public government and community of interest government – while recognizing that changes to these models can be made to reflect particular aspirations, customs, culture, traditions and values.

#### 2.3.15

When Aboriginal people establish governments that reflect either a nation or a public government approach, the laws of these governments be recognized as applicable to all residents within the territorial jurisdictions of the government unless otherwise provided by that government.

#### 2.3.16

When Aboriginal people choose to establish nation governments,



- (a) The rights and interests of residents on the nation's territory who are not citizens or members of the nation be protected.
- (b) That such protection take the form of representation in the decision-making structures and processes of the nation.

### 3.2 Financing Aboriginal Government

Earlier in this chapter, we identified three attributes that any government must have to be effective: legitimacy, power and resources. A new relationship between Aboriginal and non-Aboriginal people must provide for all three elements if self-government is to become a reality for Canada's First Peoples. It is not enough to say that Aboriginal peoples, by virtue of recognition of their inherent rights, can establish (or re-establish) their own governments with varying degrees of independent and shared authority. Such governments would be relatively ineffective without sufficient resources and financial arrangements in place to enable the effective exercise of this governing authority.

Thus far, we have addressed two of the fundamental ingredients for Aboriginal self-government, legitimacy and power. We now shift our attention to the issue of financing, beginning with a focused treatment of the financial arrangements that will be required to support Aboriginal governments under the new relationship. Lands and resources and economic development are addressed further in Chapters 4 and 5 (in Part Two of this volume).

First, we outline the main objectives that should be pursued in financing Aboriginal governments. Second, we revisit the features of the new relationship in light of the particular circumstances of Aboriginal governments and communities, recommending principles to guide the development of new financial arrangements between the Aboriginal, federal and provincial orders of government. Third, we identify and comment upon the array of funding sources and instruments potentially available to Aboriginal governments under a new rela-

True Aboriginal self-government will be elusive and illusionary unless Aboriginal people have the means by which to effect it....The mistakes of the past must not be allowed to continue and we must jointly work together to break the current bondage of poverty that...continues to marginalize Aboriginal people to the lowest end of the social economic ladder.

Gary Gould  
Skigin Elnoog Housing Corporation  
Moncton, New Brunswick, 15 June 1993

Again and again I hear, "To whom will Aboriginal governments be accountable and for what?" Well, our answer [is that] Métis people will be accountable to Métis people.

Robert Doucette  
Metis Society of Saskatchewan  
Saskatoon, Saskatchewan, 27 October 1992

tionship. Fourth, we build upon the models of Aboriginal government elaborated in the previous section, proposing 'packages' of financial arrangements suited to the features and characteristics of each. Finally, we present an argument for a Canada-wide fiscal framework to govern the fiscal relationship among federal, provincial and Aboriginal governments.

## Objectives for financing Aboriginal governments

In addressing the challenge of financing Aboriginal governments under a new relationship, we need to ask ourselves, what are the fundamental goals or objectives for financial arrangements that will support Aboriginal peoples' quest for effective and meaningful self-government? Establishing such objectives is important for several reasons. They are a starting point for the negotiations on funding arrangements that will ensue when Aboriginal peoples, acting as nations, choose to exercise their inherent right of self-government. The objectives themselves will be a subject of these negotiations and will influence the design of the financial framework for Aboriginal self-government that will be worked out among the confederation partners. These objectives will also allow for an evaluation of the implementation and continued operation of particular funding arrangements to determine whether they fulfil the purposes they were designed to achieve.

### *Self-reliance*

First and foremost, effective government depends upon a sound economic base. Without an adequate land and resource base, and without flourishing economic activity, Aboriginal governments will have little access to independent sources of revenue. Aboriginal governments will need access to fiscal instruments such as taxation. Fiscal arrangements should be structured to provide for Aboriginal self-reliance to meet their governing responsibilities.

### *Equity*

Financing arrangements must provide for an equitable distribution of resources – financial and otherwise – among and between governments, groups of people and individuals. In the design of new funding arrangements, we would empha-

It is not program monies [from DIAND] that are going to do things for us. They are not the solution. What...it [the *Indian Act*] has done to us...it has deprived us of our independence, our dignity, our respect and our responsibility.

June Delisle  
Kanien'Kehaka Raotitiohkwa Cultural Centre  
Kahnawake, Quebec, 6 May 1993

size the importance of (1) equity among the various Aboriginal governments that make up the third order of government in Canada, (2) equity between Aboriginal and non-Aboriginal people as a whole, and (3) equity between individuals.

### *Efficiency*

Efficiency dictates that a government should use limited resources in as effective a manner as possible, and in so doing promote sustainable development. This is not unlike the long-standing Aboriginal tradition of respect for the land and its uses. Financial arrangements for Aboriginal governments, and the processes employed to achieve them, should therefore be designed to be efficient.

### *Accountability*

Governments with the authority and responsibility to spend public funds for particular purposes should be held accountable for such expenditures, primarily by their citizens and also by other governments from which they receive fiscal transfers. In the context of Aboriginal governments, it is our view that this accountability rests with the Aboriginal nation rather than with individual communities. Funding arrangements should reflect this basic objective, allowing for processes and systems of accountability that are both explicit and transparent.

### *Harmonization*

Finally, financial arrangements should include mechanisms that provide for harmonization and co-operation with adjacent governing jurisdictions. This is to ensure that decisions made by individual Aboriginal governments take account of the effects of their policies on other governments. This consideration should include federal, provincial and municipal governments.

## **A principled basis for new financial arrangements**

Building on the fundamental objectives for financing Aboriginal governments – self-reliance, equity, efficiency, accountability and harmonization – we now pre-

sent a series of principles that should govern the design and development of funding arrangements for Aboriginal governments.<sup>238</sup>

### *The renewed relationship and financial arrangements for Aboriginal governments*

The new relationship between Aboriginal and non-Aboriginal people that we have proposed consists of three key elements:

- Aboriginal self-government based on a recognition of the right of self-determination and the inherent right of self-government for Aboriginal peoples;
- a relationship between Aboriginal and non-Aboriginal people and their governments that takes the form of a nation-to-nation relationship;
- recognition of Aboriginal governments as one of three constitutionally recognized orders of government in Canada.

The nature of this new relationship gives rise to the following principles, which should shape the development of financial arrangements for Aboriginal governments.

First, a renewed relationship requires fundamentally new fiscal arrangements. It is our view that developing a system of finance for Aboriginal governments based on adapting or modifying existing financial arrangements with Indian bands would be ill-advised, because those arrangements are based on a radically different kind of governing relationship. *Indian Act* band governments, for example, are perceived as a form of self-government; but in fact they are a form of self-administration, not self-government. Band governments under the *Indian Act* do not have independent authority; they derive their powers from the federal government. Moreover, given the limited range of powers delegated to them, there is little opportunity for band governments to have access to independent sources of revenue. Consequently, the financial arrangements are characterized by dependency, by extensive accountability provisions, by elaborate administrative structures and by other features that reflect that type of governing relationship. The accountability procedures for Aboriginal nation governments should not be more onerous than those imposed on the federal and provincial governments. (A brief overview of existing financial arrangements for Aboriginal governments and regional and territorial governments is provided in Appendix 3A to this chapter.)

Second, the development of a Canada-wide framework to guide the fiscal relationship among the three orders of government should be a prerequisite for negotiations leading to the development of long-term financial arrangements for individual Aboriginal governments. A key feature of the new relationship we are recommending is that it provides an opportunity for Aboriginal peoples to aggregate their collective interests as self-governing nations. This is an important step toward restoring balance in a relationship between Aboriginal and non-



Aboriginal people that all too often has been weighted unduly against the interests of Aboriginal peoples.

Likewise, Aboriginal nations collectively forming a third order of government should have an opportunity to aggregate their interests on fiscal matters. This would best be achieved through a Canada-wide fiscal framework negotiated by representatives of the federal and provincial governments and national Aboriginal peoples' organizations. The elements of such a framework, and its role in negotiations to develop financial arrangements for individual Aboriginal governments, are elaborated later in this chapter.

Third, financial arrangements should reflect the principle that for Aboriginal self-government to be meaningful, fiscal autonomy and political autonomy should grow together. This relationship should be reflected in the proportion of transfers to Aboriginal governments from the federal and provincial governments that are unconditional. A government cannot be truly autonomous if it depends on other governments for most of its financing. The nature of transfers from other governments, for example, should reflect this principle. We note that under existing financial arrangements, most of the funds Aboriginal governments receive from the federal government are of a highly conditional nature, with Aboriginal governments having to meet predetermined, detailed program criteria to continue receiving these funds.

Conditional transfers are legitimate fiscal instruments for certain purposes – for example, when the delivery of a program has an impact beyond a single community, or when country-wide standards in the delivery of certain public services are seen as desirable. As Aboriginal governments become more autonomous politically, however, the proportion of transfers from federal or provincial governments that is conditional should fall. This principle is reflected in federal-provincial fiscal relations and should also underlie fiscal relations with Aboriginal nation governments.

Fourth, financial arrangements should provide greater fiscal autonomy for Aboriginal governments by increasing access to independent revenue sources of their own. As we argue throughout this report, a critical element of fiscal autonomy is a fair and just redistribution of lands and resources for Aboriginal peoples. Without such a redistribution, Aboriginal governments, and the communities they govern, will continue to lack a viable and sustaining economic base, which is integral to self-government.

Aboriginal governments should be able to develop their own systems of taxation. While most Aboriginal people already pay taxes in Canada, the difference is that under a new relationship Aboriginal citizens would pay taxes mainly to their own governments. Accordingly, Aboriginal governments should have the tools to raise revenues from the development of their lands and resources. This taxing authority, when recognized, will be an important step toward increased fiscal autonomy for Aboriginal governments and will also encourage greater fiscal

accountability and citizen participation. If Aboriginal nations have the power to tax and have a tax base, non-Aboriginal governments will expect them to levy taxes. If no effort is made by Aboriginal governments to collect taxes, there will be a negative impact on their transfer payments from other governments.

## RECOMMENDATION

The Commission recommends that

- New Fiscal Arrangements **2.3.17** Aboriginal governments established under a renewed relationship have fundamentally new fiscal arrangements, not adaptation or modification of existing fiscal arrangements for *Indian Act* band governments.

### *Features distinguishing Aboriginal and non-Aboriginal governments: implications for financial arrangements*

There is considerable diversity among Aboriginal nations and their communities. Many Aboriginal peoples do not possess a formally recognized land base, and among those who do, there are large differences in resource wealth and economic potential. The cost of delivering services to Aboriginal people who live in remote areas is very high. Compared to the non-Aboriginal population, more Aboriginal people live in small communities whose size limits the economies of scale that urban governments can achieve. The territories of an Aboriginal nation government may not be contiguous, which also affects the cost of delivering services.

Membership in Aboriginal nations is not necessarily defined by residency. For example, a member of a particular Aboriginal nation might make his or her home in a non-Aboriginal community (often an urban one). Likewise, non-Aboriginal persons might reside within an Aboriginal community or territory but not be citizens of that political constituency. This is an important issue, given that existing fiscal transfers for non-Aboriginal governments are based wholly on the principle of residency.<sup>239</sup>

In terms of the transition to self-government, it is likely that Aboriginal governments will assume varying degrees of jurisdictional authority, at least initially, because of political choices that nations or peoples make regarding their ability or preparedness to exercise the full powers of self-government. This is true of any new or developing system of government.

As a final example, the policy of taxation exemption as applied to 'on-reserve Indians' is unique to band governments under the existing *Indian Act* rela-

[To] receive funds which match neither community needs nor abilities is to invite failure. To receive no funds [at all] is to invite disaster.

Darryl Klassen

Mennonite Central Committee

Vancouver, British Columbia, 2 June 1993

tionship. Under section 87 of the act, status Indians residing on-reserve and their property are exempt from certain kinds of taxation levied by non-Aboriginal governments. Under the new relationship, we note that Aboriginal people will be subject to taxation levied by their own governments. Application of the section 87 exemption in the transition phase is a matter that must be considered in the treaty negotiations leading to self-government agreements for status Indians.

All of the features distinguishing Aboriginal from non-Aboriginal governments, taken together, will necessarily have an impact on the effectiveness of financing arrangements that are developed for Aboriginal governments. Thus, we will suggest several considerations that should govern the design of financing mechanisms for Aboriginal governments under the new relationship.

The financing mechanisms employed in arrangements for individual Aboriginal governments should provide for considerable institutional flexibility, especially during the transition to self-government. Assuming that all Aboriginal nation governments will have the potential to exercise the same range of governing authorities, it is nonetheless evident that individual governments will proceed at varying speeds in assuming these responsibilities.

In this context, the financing mechanism should be designed so that it does not force Aboriginal governments to assume fewer areas of jurisdiction than they need. For example, if the financing mechanism for a program or policy sector requires a large bureaucratic structure to be effective, the associated costs of administration – in the face of scarce resources – may be so high that Aboriginal governments are unable to gain access to it. Similarly, it is important to ensure that the financing mechanism does not prevent an Aboriginal government from asking other governments to deliver public goods or services for which it is not yet ready to assume responsibility, or that it may never wish to deliver itself.

The financing mechanism should be designed to promote cost-effectiveness and the incentive to innovate. This is directly linked to our earlier arguments that Aboriginal people should be given the opportunity to reorganize or structure their governments in a manner that provides for greater economies of scale in delivering public services. If financing mechanisms are focused only on supporting public services in small individual communities, as under the existing DIAND-band government relationship, it is evident that some public functions will simply be too costly to administer and support. The financing mechanism



should enable Aboriginal governments to realize greater economies of scale through co-operative service delivery arrangements with adjacent jurisdictions (including non-Aboriginal ones, depending on the nature of the activity).

It follows that as Aboriginal governments become more autonomous, a significant proportion of the transfers received from the other orders of government should be unconditional. This will enable Aboriginal governments to take into account the costs and benefits of providing public services and goods in various ways, and ensure that decisions regarding the necessary trade-offs among alternative means are sensitive to the needs and aspirations of the nation itself.

It is also important that financing agreements minimize administrative costs as much as possible. Keeping administrative costs as low as possible is particularly important for Aboriginal governments, given limited own-source revenues. Therefore, the vast majority of transfers received from the other two orders of government should be devoted as much as possible to supporting actual services, rather than to the high costs of constantly negotiating and renegotiating annual financial agreements. Formula funding such as that found in the fiscal arrangements for the territorial governments is based on a set of indicators and is usually reviewed every five years. This allows for better planning and greater predictability and autonomy.

The financing mechanism should also reflect the capacity of the Aboriginal government to raise own-source revenues and promote fiscal equity. The equalization principle is a cornerstone of federalism and is enshrined in section 36 of the *Constitution Act, 1982*.

36(2) Parliament and the government of Canada are committed to the principle of making equalization payments to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation.

We believe that this equalization principle should extend to the Aboriginal order of government as well.

For provincial governments, equalization is achieved through a system of payments that takes into account a government's revenue-raising capacity to determine eligibility for and the level of unconditional transfers. However, the capacity of Aboriginal governments to raise revenues through instruments such as taxation is considerably less than that of non-Aboriginal governments generally. Moreover, differences in the need for and cost of providing public services across Aboriginal communities are greater than for comparable non-Aboriginal communities. For example, a northern or isolation allowance similar to that of the government of the Northwest Territories will be required for many Aboriginal governments.

When the provinces entered Confederation, several received statutory subsidies, partly for surrendering their indirect taxes to the federal government and



often to offset their debt.<sup>240</sup> In 1907, at Canada's request, the British government passed *An Act to make further provision with respect to the sums to be paid by Canada to the several Provinces of the Dominion*, effectively amending section 118 of the *Constitution Act, 1867* and increasing the burden of the federal government's payments to the provinces. Later, special payments were made to the maritime provinces following the Royal Commission on Maritime Claims (the Duncan commission report of 1926) and to both the prairie and maritime provinces during the 1930s, when several provinces were on the verge of bankruptcy.<sup>241</sup>

Consideration of need is not new to fiscal arrangements in Canada. New Brunswick received a half-yearly grant for ten years following Confederation,<sup>242</sup> and British Columbia a railroad. Prince Edward Island was promised regular transportation to the mainland, which the federal government provided through a ferry service. Honouring this promise required a constitutional amendment in 1993 to replace the commitment to 'steam service' with one to 'a fixed crossing', and to prevent the imposition of tolls or the private operation of the crossing.<sup>243</sup>

Similar treatment should be considered now as we lay the groundwork for three orders of government in Canada and try to meet the particular needs of Aboriginal governments.

## RECOMMENDATION

### The Commission recommends that

#### Expenditure Needs 2.3.18

The financing mechanism used for equalization purposes be based not only on revenue-raising capacity, but also take into account differences in the *expenditure needs* of the Aboriginal governments they are designed to support, as is done with the fiscal arrangements for the territorial governments, and that the tax effort that Aboriginal governments make be taken into consideration in the design of these fiscal arrangements.

### Funding sources and instruments for Aboriginal governments

Governments rely on a variety of sources and related instruments for financing their public activities. Here we consider four categories relevant to the financing of Aboriginal governments in Canada:

- own-source funding;
- transfers from other governments;

In the old days we had a tradition of caring and sharing. If a person was sick or injured, the Chief would delegate others to hunt for him and provide fire wood. We redistributed our wealth for the good of all, and that is what any good system of taxation is supposed to do.

Elder Ernie Crowe from Piapot  
as retold by Chief Clarence T. Jules  
Kamloops First Nation  
Ottawa, Ontario, 5 November 1993

- funding from treaties and land claims settlements; and
- borrowing authorities for capital expenditures.

These will serve as the basis for the financial packages associated with particular models of government and will inform the negotiations leading to a proposed Canada-wide fiscal framework for financing Aboriginal governments.

### *Own-source funding*

In theory, a broad array of instruments is available to governments for raising their own revenues. For Aboriginal governments these might include taxes; tax-sharing; resource rents and royalties; user fees, licences and fines; proceeds from gaming activities; and corporation revenues. In reviewing these sources, however, we should keep in mind that the potential for each instrument to raise revenues will, in practice, vary considerably.

#### *Taxation*

Here we consider four main kinds of taxation: (a) personal income tax, which in the case of Aboriginal governments could apply to Aboriginal citizens and to non-citizen residents within an Aboriginal-controlled territory; (b) corporate taxes on private business, both Aboriginal and non-Aboriginal; (c) sales or consumption taxes; and (d) taxes or lease fees on land and property. The revenue-raising potential of these kinds of taxation depends directly on levels of income, the nature and degree of economic development and activity, and the degree of authority to use the various forms of taxation.

When governments share authority over a particular kind of taxation – for example, personal or corporate income tax – they can establish a common base and then negotiate the share of the revenues collected for each order of government. As part of the financial arrangements for Aboriginal governments, this kind of tax-sharing arrangement would depend naturally on the authority that Aboriginal governments have over certain kinds of taxation, their willingness to assert or exercise this authority, and the revenue-raising potential of any taxes to be levied.

We want control of our destiny and a peaceful co-existence with Canadian society. In order for this to happen, First Nations must have an equitable share of lands, resources and jurisdiction, and fiscal capability to fulfil their responsibilities as self-determining peoples.

Chief Clarence T. Jules  
Kamloops First Nation

Ottawa, Ontario, 5 November 1993

As we have stated, attaining a significant measure of fiscal autonomy is a fundamental prerequisite for effective self-government. A people that does not possess the means to finance its own government will be dependent on the priorities of others. This can be mitigated by negotiating long-term arrangements that commit other governments to fiscal transfers. But ultimately, a government that must look to others for most of its financial requirements remains dependent. Hence the importance of own-source revenues and authority for Aboriginal nations to tax their own resources and citizens.

Given the many responsibilities of Aboriginal governments, and assuming that Aboriginal people will want to receive a wide range of high quality services, Aboriginal governments will need to collect significant amounts of revenue. Other governments that support Aboriginal governments through transfers will expect them to do so. Indeed, transfers are likely to depend on the revenue collection effort of the recipient government, as is common in fiscal arrangements between governments in Canada.

Aboriginal nation or public governments will find it necessary to tax economic activity on their territory. This will take the form of personal income tax on their residents, corporate tax on businesses operating on their territory and, most likely, some form of royalty tax on resources extracted from their lands and waters. Income tax will not be a suitable instrument for financing community of interest governments.

It can be expected that Aboriginal governments will tax the personal income of all residents on their territory, whether or not a resident is a citizen under the nation government model. Income tax will likely be levied regardless of whether a resident's income was earned on the territory or elsewhere. Citizens of an Aboriginal nation residing off the territory can expect to continue to pay personal income tax to the governments in whose jurisdiction they reside and from whom they receive services, that is, the federal and provincial governments. Residency as the determinant of tax status is the arrangement that applies in all jurisdictions across Canada today.

The Commission proposes that residents on an Aboriginal nation's territory would pay all income tax to the Aboriginal government and not, as is the

case with other residents of a province, to the federal and provincial governments. Residents under the jurisdiction of an Aboriginal public government would continue to pay income tax to the public, federal and, where appropriate, provincial government. We argue in favour of this position for two reasons.

First, levels of economic activity and hence of personal income on the vast majority of existing Aboriginal lands are well below those in most neighbouring communities. Aboriginal governments will be hard-pressed, until significant additional lands and resources are transferred to them, to raise a major portion of the financial resources they will need from their own tax base. Even after the acquisition of an adequate land base, economic development to raise personal income levels will be a long process in most communities. Aboriginal governments will need the full resources that the taxation capacity of their communities can generate for some time to come.

A second reason for advocating this arrangement relates to the controversy over tax exemption for Aboriginal people. A widely held perception among Canadians is that Aboriginal people enjoy generous tax exemptions. This is not the case.<sup>244</sup> By the same token, many Aboriginal people believe that tax exemption is an Aboriginal or a treaty right that should benefit all Aboriginal people wherever they live.<sup>245</sup>

The current tax exemptions leave room for taxation that could be taken up readily by First Nations governments. Doing so would not be an infringement of Aboriginal rights, and the issue of compensation therefore does not arise. Some would argue further that the exemption is a reflection of the original autonomy of Aboriginal rights, and should be seen as being closely linked to the inherent right of self-government.

The Commission believes that the question of taxation needs to be addressed in the context of self-governing Aboriginal territories. If Aboriginal governments emerge with an adequate land and resource base to sustain self-reliance for their people, those governments will want to exercise control over their finances for reasons already discussed. We believe that responsible self-government is the most effective route for resolving the divisive debate over taxation. The severely limited fiscal capacity of most Aboriginal communities and the willingness of most Aboriginal people to support their own governments through appropriate taxation both argue that personal and corporate income taxes payable by residents and levied on economic activity should be paid to Aboriginal governments.

Circumstances might arise where residents on an Aboriginal nation's territory will attain a level of average income equivalent to that enjoyed by residents of the region surrounding them. By the same token, some Aboriginal governments will in time have fiscal capacity equal to that of neighbouring governments. These circumstances will affect the level of fiscal transfers Aboriginal governments receive, including, where the financial situation justifies, the elimination of such transfers.



Aboriginal nations will exercise taxation authority, including decisions on the level of taxation on their territory. Those governments may choose, as some provincial governments do now, to use lower levels of taxation to stimulate economic activity. In so doing, they will have to bear in mind the impact of such actions on the federal government's calculation of fiscal capacity in determining fiscal transfers.

If they establish tax rates significantly lower than neighbouring jurisdictions, Aboriginal governments may find their territories becoming tax havens for non-citizen residents. In such circumstances, the federal government can be expected to lower the level of fiscal transfers to reflect the taxation capacity not used. There is a fine line between differentiated tax rates for purposes of social and economic policy and the creation of artificial tax havens. In provinces that levy a lower rate, taxpayers must still pay a common level of tax to the federal government. If the federal government agrees, as we propose, to see the revenues it would have raised go directly to the Aboriginal nation government, it can be expected to require arrangements that do not permit tax havens.

Where services continue to be provided by the province, we believe they should be paid for by a contractual arrangement between the governments involved, thus eliminating the rationale for provincial taxation.

---

## RECOMMENDATIONS

### The Commission recommends that

#### Own-Source 2.3.19

##### Revenues

Financial arrangements provide greater fiscal autonomy for Aboriginal governments by increasing access to independent own-source revenues through a fair and just redistribution of lands and resources for Aboriginal peoples, and through the recognition of the right of Aboriginal governments to develop their own systems of taxation.

#### Income Taxes 2.3.20

Aboriginal citizens living on their territory pay personal income tax to their Aboriginal governments; for Aboriginal citizens living off the territory, taxes continue to be paid to the federal and relevant provincial government; for non-Aboriginal residents on Aboriginal lands, several options exist:

- (a) all personal income taxes could be paid to the Aboriginal government, provided that the level of taxation applied does not create a tax haven for non-Aboriginal people;

- (b) all personal income taxes could be paid to the Aboriginal government, with any difference between the Aboriginal personal income tax and the combined federal and provincial personal income tax going to the federal government (in effect, providing tax abatements for taxes paid to Aboriginal governments); or
- (c) provincial personal income tax could go to the Aboriginal government and the federal personal income tax to the federal government in circumstances where the Aboriginal government decides to adopt the existing federal/provincial tax rate.

### 2.3.21

Aboriginal governments reimburse provincial governments for services the latter continue to provide, thereby forgoing the requirement for provincial taxes to be paid by their residents.

Measures will have to be taken to ensure that non-Aboriginal residents are represented in the decision-making processes of the Aboriginal nation government.<sup>246</sup> In the case of the Sechelt Indian band government in British Columbia, this was accomplished through provincial legislation, the *Sechelt Indian Government District Enabling Act*. Among other matters, the legislation provides for the creation of an advisory council, which is the primary mechanism for non-Aboriginal residents on Sechelt lands to participate directly in the affairs of the district.<sup>247</sup>

## RECOMMENDATION

The Commission recommends that

Non-Aboriginal  
Representation

### 2.3.22

Non-Aboriginal residents be represented effectively in the decision-making processes of Aboriginal nation governments:

### *Resource rents and royalties*

Rents or royalties can be levied on the extraction and development of natural resources. For Aboriginal governments, they are another possible source of revenues whose potential depends on the existence of natural resources within a given territory, on the value of the resources and the cost of developing them,

and on the degree of authority and control Aboriginal governments have over the development and taxation of such resources.

### *User fees, licences and fines*

Governments can also charge user fees and licence fees – instruments targeted at individual users of particular government services. There has been a growing trend among governments everywhere in the last decade to make greater use of such levies. However, as with taxes, their potential for raising revenues is limited by the number and level of such fees that residents are willing to tolerate. Fines are raised from those breaking a law, and traffic violations can account for a significant revenue base.

### *Gaming*

In the last decade or so, some Aboriginal governments in Canada and the United States have established gambling casinos on their territories, both to assert their self-governing authority and to develop a potentially lucrative revenue source in communities that are significantly disadvantaged economically. The feasibility of establishing gaming enterprises is highly dependent on the distribution of legislative authority, on the proximity of such establishments to densely populated centres, and on the willingness of these populations to engage in gaming activities. Given the uncertainty and controversy surrounding the issue, it would be better to negotiate gaming within the treaty processes.

### *Aboriginal and public corporation revenues*

Own-source funding is also available in the form of revenues from Aboriginal government or public corporations. Such corporations, where Aboriginal ownership is collectively held, can be either single or joint ventures; and in the case of public government, potentially can include both public and Aboriginal corporations. Unlike royalties and resource rents, the potential for revenue from such corporations is not dependent on the level and nature of economic activity within a given territory, because these corporations may choose to invest outside of their Aboriginal nation's traditional territory.

Notwithstanding the apparent variety of sources potentially available to a government through these instruments, the reality is that own-source financing for Aboriginal governments is currently very limited and likely will remain so for some time. This brings us back to a key point about the financing of Aboriginal governments – the overwhelming importance of a sufficient land and resource base and of sustainable economic development to effective self-government. Without access to land and resources, it will be impossible to establish a viable and sustainable economic base upon which Aboriginal governments will be able to finance their activities. (See Chapters 4 and 5, in Part Two of this volume, for detailed coverage of these issues.)

### *Transfers from other governments*

Transfers from other orders of government can be a key source of financing, especially in federal systems of government. Provincial governments, for example, receive a significant portion of their funding in the form of transfers from the federal government, as do municipal governments from the provinces.

The existing arrangements for financing *Indian Act* band governments are realized largely through fiscal transfers, although the nature of these transfers differs from the federal-provincial arrangements in several important ways. (See Appendix 3A for a brief overview of these arrangements.) Here we consider two types of intergovernmental transfers, conditional and unconditional.

#### *Conditional transfers*

Conditional transfers entail conditions established by the donor government to influence the behaviour of the recipient government. They are either spending-conditional or program-conditional.

Spending-conditional transfers require the recipient government to match a portion of the funds received from the donor with their own expenditures. The requirements are usually quite strict, leaving little autonomy to the recipient government. Matching transfers are usually employed when the services they are designed to finance have an impact beyond a particular community – what economists call ‘externalities’ – and when both donor and recipient governments have sufficient own-source revenues to draw upon.

An example drawn from the recent history of federal-provincial fiscal arrangements is the Canada Assistance Plan (CAP), under which the federal and provincial orders of government shared expenditures for basic welfare services, usually on a fifty-fifty basis.<sup>248</sup> If this form of transfer were used to finance Aboriginal governments, special attention would need to be given to the capacity of Aboriginal governments to raise their own-source funding – that is, to their ability to match funds from a donor government – as well as to the degree of their jurisdictional authority. Matching need not occur only on a fifty-fifty basis, and such transfers could potentially be available from both federal and provincial governments.

Spending-conditional transfers can also be used for specific purposes that are narrower in scope. Such transfers are more incidental in nature, arising when the need for particular public goods or services is not anticipated by either the donor or the recipient government (for example, in case of flood or other natural disaster), or where such expenditures do not fit neatly with the distribution of jurisdictional authority.

Rather than being built into the basic intergovernmental fiscal framework, specific purposes transfers are usually developed through ad hoc arrangements based on consultation and co-operation among federal, provincial and municipal governments. This system was used to introduce a national infra-



structure program in 1993 and to promote regional development across Canada through federal-provincial general development agreements and other instruments during the past 30 years. Other common examples are recreation facility capital grants that provincial governments provide for municipalities and the contribution agreements between DIAND and Indian bands for major capital projects (see Appendix 3A). Such transfers may be relevant particularly for Aboriginal governments in the transition phase to self-government because Aboriginal peoples or nations decide upon the range of governing jurisdiction they want to assume initially.

Conditional transfers may also be tied to specific types of expenditures for program areas. This provides the recipient government with more autonomy in designing programs and services to match regional conditions. If certain conditions or objectives – usually identified in legislation – are not met in the program area, the donor government may impose a penalty, often in the form of a reduced transfer to the recipient government.

A practical example of program-based conditional transfers is the federal funding the provinces have received for medical and hospital services. This funding is received by provincial governments on the condition that provinces adhere to the five basic objectives of the *Canada Health Act* – universality of coverage, comprehensiveness of insured services, accessibility, portability and public administration. If these objectives are not adhered to, the federal government may decide to withhold a percentage of the funds to discourage the deviant practice.

Conditional transfers might be available for financing Aboriginal governments when such governments decide that they do not want to assume full responsibility for particular program areas, or where regional or Canada-wide standards or objectives in the delivery of certain public services are seen as desirable, such as in the field of health.

### *Unconditional transfers*

The key characteristic of unconditional transfers is that funds, or sources of funds, are transferred unconditionally – with no strings attached – thus leaving the recipient government with the independent authority to spend such funds as it sees fit. Unconditional transfers also come in a variety of forms.

*Cash transfers* provide lump sums of money, usually determined according to an agreed formula, that are transferred from one level of government to another annually. This kind of transfer was reflected in part in the financial arrangements for health and post-secondary education shared by the federal and provincial governments under the former Established Programs Financing (EPF) program. The EPF arrangements involved a mix of instruments reflecting several of the transfer characteristics outlined in this section, one of which is a cash or lump sum grant. Since the EPF program was negotiated in 1977, provincial governments have been free to use these funds for any purpose, regardless of whether

it related to post-secondary education or health. The new Canada health and social transfer is comparable in approach, although the cash portion of the transfer is expected to diminish over time.

Cash transfers would allow for considerable autonomy in the financial arrangements for Aboriginal governments, even if the initial arrangements are nominally based on the distribution of expenditures for general program areas, as they were in EPF.

In tax-sharing, revenues are either collected by two governments or they are returned to the jurisdiction where they originated by the government that collects the taxes. In *revenue-sharing*, one government (usually the federal or provincial) pools its revenues from various sources (such as resource royalties), then shares these revenues with provincial or municipal governments. As a source of financing for Aboriginal governments, this would be relevant in the case of co-management and co-jurisdiction of lands and resources, and would depend on the particular agreements reached with the other governing jurisdictions.

*Equalization* grants are an element of federal-provincial tax-sharing. They replaced the tax rental agreements instituted during the Second World War, in which the federal government rented exclusive control of personal and corporate income tax and succession duties. First formally introduced in 1957, equalization provides that the provinces will receive 10 per cent of the personal income taxes raised, 9 per cent of corporate profits and 50 per cent of federal succession duties. Of course, 10 per cent of income taxes generates more revenue in a wealthy province than in a poor one. To compensate, the governments agreed to bring all provinces' revenues up to a certain per capita standard. Under the current program, employing a more broadly representative tax base, a five-province standard is in effect. All provinces are guaranteed access to revenues equal to the per capita average from applying national-average tax rates to the representative tax bases in the five designated provinces (Ontario, Quebec, British Columbia, Saskatchewan and Manitoba). All provinces receive equalization grants except British Columbia, Alberta and Ontario.<sup>249</sup>

The equalization principle was enshrined in section 36(2) of the *Constitution Act, 1982*, committing Parliament and the government of Canada to "making equalization payments to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation".

If equalization were extended to Aboriginal governments, account would be taken of both the fiscal capacity and the fiscal need of the Aboriginal government – how much capacity they have to tax and how much revenue they need to provide required services. Likely it would be assumed, as it is for provincial and territorial governments, that Aboriginal governments tax at national-average rates. If Aboriginal governments chose not to tax, this would be reflected in reduced equalization payments – that is, if Aboriginal governments had the

capacity to raise revenues, but chose not to do so. If Aboriginal governments kept all income and sales taxes, this too would be factored into the equalization formula, in effect reducing the transfer from other governments. If an Aboriginal nation government's revenues are great enough that they no longer require equalization payments, consideration should be given to transferring some of their revenues to other Aboriginal nations – in effect, sharing the wealth through inter-Aboriginal nation equalization.

Aboriginal nation governments would enjoy intergovernmental immunity from taxation by the Crown, as the federal and provincial governments do. They would also be eligible for grants in lieu of taxes on federal and provincial property on Aboriginal lands, just as federal and provincial governments pay grants in lieu of taxes to municipalities to make up for the fact that municipal governments cannot tax federal or provincial property.

Finally, there may be very specific unconditional transfers, such as northern or isolation allowances to offset the higher cost of living in northern and remote communities.

Regardless of the type of fiscal transfer, the level or magnitude of such transfers may also depend upon certain characteristics of the recipient government. For example, amounts transferred can be based on the fiscal capacity of the recipient government, using measures such as the revenue potential of various tax bases under a given jurisdiction. The principle of fiscal capacity, for example, is at the core of the unconditional transfers paid to qualifying provinces under the current equalization program.

As well, the level of intergovernmental transfers can be related directly to the expenditure levels of a recipient government in providing particular services to its citizens.<sup>250</sup> An example of this is the conditional matching or cost-shared transfers under the former Canada Assistance Plan, where the general level of expenditures is determined by the demand for welfare services in particular provinces.<sup>251</sup> The needs basis has also been used in the fiscal arrangements for the Yukon and Northwest Territories and in other federal systems as one of the factors determining the appropriate level of equalization payments for the constituent governments of the federation. Consideration of both fiscal capacity and fiscal need in the design of fiscal arrangements for Aboriginal governments will be especially important, given the generally lower level of economic development in Aboriginal communities.

It is clear that transfers from other levels of government will be a prominent feature of financial arrangements for Aboriginal governments, now and in the future. This is because, first, Aboriginal peoples' right of self-government has not been fully recognized by the Canadian state, and Aboriginal governments accordingly have not had access to the instruments necessary for own-source financing. This is exacerbated by the continuing inequitable distribution of lands and resources between Aboriginal and non-Aboriginal people in this



country, which leaves Aboriginal governments without a viable and sustainable economic base upon which to finance basic public services for their citizens. As these injustices are corrected over time, Aboriginal governments will gradually become less reliant on transfers from other governments.

Second, transfers from other orders of government will continue to be an integral part of financial arrangements for Aboriginal governments because of the nature of the federal system of government in Canada. Significant efficiency and equity benefits accrue from having the federal government assume a relatively stronger revenue-raising role in the federation, then distribute these revenues in the form of fiscal transfers to other governments so they can meet their expenditure responsibilities more effectively. Aboriginal governments, as one of three constitutionally recognized orders of government, will necessarily become a part of this intergovernmental fiscal framework and receive transfers from the federal government as the provinces do now.<sup>252</sup>

### *Entitlements from treaties and land claims*

There is a third category of funding sources specific to the circumstances of Aboriginal governments in Canada, especially those established on the nation-based model. These are revenues arising from specific claims settlements and comprehensive land claims and treaty land entitlement settlements. Because of the unique nature of these arrangements, they deserve special treatment in terms of being considered as potential sources for the financing of Aboriginal governments.

#### *Specific claims settlements*

Specific claims settlements can sometimes be indirect sources of funding for Aboriginal nations, but only for some, since many do not have treaties with the Crown or may not be engaged in related specific claims processes.<sup>253</sup>

The Commission is of the view that revenues arising from specific claims settlements should not be considered a direct source of funding for Aboriginal governments, even if some governments choose to use some of these funds directly for government purposes. Often, the purpose of these settlements is to compensate for lands taken fraudulently or expropriated by the federal government; for example, for a military base, or for reserve lands previously reduced, without compensation, for a railway right of way. These specific claims settlements are granted generally to right a wrong, not to provide for the financial support of Aboriginal governments. For the most part, Aboriginal people are seeking to replace the land they lost with other land. Payments for specific claims would likely produce temporarily increased economic activity in a local economy and provide only indirect funding to Aboriginal governments, for example, through taxation.<sup>254</sup>



## RECOMMENDATION

The Commission recommends that

Specific Claims 2.3.23

Settlements Revenues arising from specific claims settlements not be considered a direct source of funding for Aboriginal governments and therefore not be included as own-source funding for purposes of calculating fiscal transfers.

### *Comprehensive claims settlements and treaty land entitlements*

Comprehensive claims settlements and treaty land entitlements are another potential source of funding, but again only for some Aboriginal governments and only in an indirect way. Resolution of comprehensive claims or treaty land entitlements can include a financial settlement as well as land as part of the compensation package for the Crown having denied Aboriginal peoples access to and control of their territories.<sup>255</sup>

In comprehensive land claims settlements, as in specific claims settlements, a payment of funds should not be considered a direct own-source of funding for Aboriginal governments. However, if an Aboriginal government decided to invest the monies from a financial settlement – perhaps through an investment corporation established for the purpose – it would be appropriate in certain circumstances to consider any resulting income as a continuing own-source of funds for that government. Under such circumstances, this kind of funding would also be compatible with the public model if an investment corporation were established under its authority.<sup>256</sup>

The earnings from the funds (the indirect income) may or may not be included in own-source revenues for purposes of calculating fiscal transfers. If they are used to make loan repayments for funds advanced to finance treaty negotiations, to offset the effects of inflation in order to preserve the value of the principle agreed to in the treaty (cash settlements are usually distributed over a long time – up to 20 years – thus discounting their value), or for charitable activities or community good works, they would not be included.

Interesting precedents in this regard are included in the Atlantic Accord and the Canada-Nova Scotia Offshore Petroleum Resources Accord. For example, the Atlantic Accord addresses, among other matters, revenue-sharing between Canada and Newfoundland with respect to offshore oil and gas and how this revenue would affect the equalization payments Newfoundland now receives. Article 39 of the accord states, in part, that

Progressive First Nations realize that public financing is required by Native government in order to build the sorts of community Native peoples want. For instance, Westbank wants to use its property tax revenues to arrange financing to build a new community hall to replace the existing small one. There is no structure, however, which allows First Nations to borrow as governments. The absence of an ability to borrow as governments has exacerbated the program of underdevelopment on reserves.

Larry Derrickson  
Councillor, Westbank Indian Band  
Kelowna, British Columbia, 16 June 1993

the two governments recognize that there should not be a dollar for dollar loss of equalization payments as a result of offshore revenues flowing to the Province. To achieve this, the Government of Canada shall establish equalization offset payments.<sup>257</sup>

Two types of offset payments are foreseen, both adjusting for the loss in equalization payments that would result if Newfoundland's own-source revenues increase. The first type provides for a 12 year phase-out of equalization entitlements from the commencement of production (assuming that resource revenues make Newfoundland a 'have' province). The second type provides for federal government payments equivalent to 90 per cent of any decrease in equalization payments compared to the previous year. In the fifth year of offshore production, this offset rate is to be reduced by 10 per cent, then by 10 per cent in each subsequent year.

## RECOMMENDATIONS

The Commission recommends that

- Financial Settlements **2.3.24**  
Financial settlements arising from comprehensive land claims and treaty land entitlements not be considered a direct source of funding for Aboriginal governments.
- Investment Income **2.3.25**  
Investment income arising from Aboriginal government decisions to invest monies associated with a financial settlement – either directly or through a corporation established for this purpose – be treated as own-source revenue for purposes of cal-

culating intergovernmental fiscal transfers unless it is used to repay loans advanced to finance the negotiations, to offset the effect of inflation on the original financial settlements, thereby preserving the value of the principal, or to finance charitable activities or community works.

### *Borrowing authority*

The funding sources and instruments we have identified have focused principally on the operating costs of government. Another important component of financial arrangements is the financing of capital expenditures by means of borrowing money through public offerings and loans from financial institutions.

This is a critical issue for Aboriginal peoples because many of their communities lack basic infrastructure, including schools, good roads and sewage systems. Throughout our public hearings, we heard Aboriginal people deplore the fact that when DIAND devolves responsibility for certain programs or services, the associated funding arrangements are often designed to meet only normal operating costs and not to provide the means to maintain or replace existing infrastructure as it declines in value or utility over time. Moreover, existing financial arrangements under the *Indian Act* severely limit the ability of band governments to pursue independent sources of financing for such capital expenditures because of their lack of corporate capacity and the uncertain legal status of reserve lands. Accordingly, band governments pay very high interest rates on loans.

If Aboriginal peoples decide to exercise self-government at the level of nation or public government, borrowing authority will be an important component of financial arrangements that are designed to support the full range of public expenditures, both operating and capital. The constitutional and legal

Our preference is really...to be financially independent from the government. I don't want to have to depend, and my children, on the [federal] government's whim of the day, if they want to send the money that day or not, if the Minister of Finance says, 'We can't afford it', so Indians will become a social program and we can be cut, as they are doing already. That's not the objective...All we want is recognition of the tools that are required to sustain ourselves economically.

John 'Bud' Morris

Executive Director, Mohawk Council of Kahnawake  
Kahnawake, Quebec, 6 May 1993

status of Aboriginal governments under the new relationship would provide the necessary basis to establish these borrowing authorities.

## Financial arrangements for models of Aboriginal government

Earlier in this chapter we elaborated three models of government: nation, public and community of interest. In part, this was to help answer the question, “What might Aboriginal government look like under a new relationship?” The value of these models is to demonstrate, in a practical and understandable way, some of the opportunities and constraints that exist for Aboriginal self-government, as well as the diversity possible within these models.

### *Funding instruments and sources: compatibility with the models and feasibility*

We now examine the funding instruments and sources introduced earlier to show how they fit with each of the models.<sup>258</sup> Our focus will be on the extent to which the four primary sources – own-source revenues, transfers from other governments, funding from treaties and land claims settlements, and borrowing authorities – are practical and feasible for each of these models. Mindful of the principles that should inform the design of financial arrangements for Aboriginal governments, we also indicate whether a particular source of funding is compatible with the operation of a given model.<sup>259</sup>

### *Own-source funding*

Own-source revenues are a critical component of any self-government arrangement because they provide for a sufficient level of fiscal independence and autonomy to support the effective exercise of governing jurisdiction and authority implicit in such an arrangement. The existence of own-source revenues also allows for important accountability links between governments and the citizens they serve.

All of the own-source funding instruments are compatible with both the nation and the public model of government. This reflects their status as full-fledged governments capable of exercising a broad range of authority over an explicitly defined territory. The practicality or feasibility of these sources for use by either type of government depends on a number of factors, however, including

- the level of income among the citizens or residents within a governing jurisdiction;
- the level of economic activity within these jurisdictions;
- the presence of, and control (either solely or shared) over, certain types of land or natural resources; and
- the level of administrative capacity.



These factors need to be considered on a case-by-case basis for each funding instrument.

The community of interest model is not compatible with many of the own-source revenues. One reason is that many of these funding instruments – for example, personal and corporate taxation, and resource royalties – will simply not be available to community of interest governments, which would have no jurisdiction in these fields. There are exceptions. A portion of municipal taxes, such as those currently available in some provinces for separate schools, would be available. In that case, individuals elect to identify themselves or their property with a particular agency, and the taxes collected flow to that agency. User fees for the delivery of particular services could be a further revenue source.

Examining these sources in detail, we see that personal and corporate income taxation, while compatible with the nation-based and public models, nonetheless poses certain problems in terms of cost-effective administration. These types of taxation are costly to administer and require a large volume of revenues in order to take advantage of economies of scale in collection. It is because of these efficiency considerations that the federal government collects personal income taxes on behalf of all provincial governments (except Quebec), at no cost to the provinces and remits these revenues to the provinces.<sup>260</sup> These arrangements are formally recognized in tax collection agreements negotiated between the federal and provincial governments.

Even a Canada-wide Aboriginal system of income tax collection would be prohibitively expensive. Average collection costs would be high compared to the small volume of revenues to be collected and the fact that the Aboriginal population is widely scattered across the country. This is a reflection of the small population base and the fact that Aboriginal people, as a group, have significantly lower levels of income than other Canadians. A more realistic possibility would see the federal government collect all income taxes and then return the revenues designated for an Aboriginal government back to that government.

Other forms of taxation are available only to the two territorially-based models of Aboriginal government. The feasibility of sales taxes, for example, as revenue source would necessarily depend on the level and nature of economic activity within a particular jurisdiction. Tax collection agreements would also be required for cost-effective administration, although in this case such agreements would likely be negotiated with provincial governments.

Taxes or lease fees on land and property are another likely source of revenue that is considerably easier and less costly to administer than other taxes. Its revenue-producing capacity would depend on the number of private leases and the extent of commercial property in an Aboriginal-controlled territory.

Resource rents and royalties are compatible with both the nation and the public model. Their efficacy as own-source revenue depends, in part, on the nature of tax arrangements (especially where management and control over lands and

resources is shared with other governing jurisdictions), as well as on the existence of commercially desirable natural resources in an Aboriginal government's territory.

User fees, licences and fines are compatible with all three models and are likely to be one of the more important sources of revenue for community of interest governments. Their efficacy as a revenue producer is subject to the level of fees that citizens seeking these services are willing to pay. This is less true of fines, unless they are regarded as unfairly high and simply a covert form of taxation.

Proceeds from gaming activities are compatible with all the models. However, this source would not be available to all Aboriginal governments as revenues would depend on the establishment of profitable gambling casinos or large-scale bingo operations in or near densely populated urban centres. However, given the uncertainty and controversy surrounding the issue, it would be better for Aboriginal governments to reach agreements through the treaty processes.

Finally, corporate revenues generated by collectively owned Aboriginal corporations are potentially available to the nation and public models of Aboriginal government. Revenue-raising capacity will depend on the level and nature of economic activity in a particular jurisdiction.

### *Transfers from other governments*

Transfers from other governments are another important source of financing to be considered in the design of financial arrangements for Aboriginal governments. Our focus here is on transfers from the federal and provincial governments. Municipal governments may also be involved in intergovernmental fiscal arrangements, but their relationship with Aboriginal governments is more likely to occur on an ad hoc, contract basis focused on the delivery of particular services.

At the outset, several general observations can be made. All forms of transfers are compatible with territory models. At the same time, however, the mix of transfers available to nation and public governments should be predominantly unconditional in nature. This is consistent with the independent decision-making authority implied by constitutionally recognized self-government. Territory-based governments, when fully developed, are capable of exercising jurisdiction and governing functions over a defined territory, and unconditional transfers will allow for the planning, autonomy and flexibility required to make self-government real. At the same time, such transfers assume an increased administrative capacity on the part of Aboriginal governments.

Governments based on the community of interest model will find unconditional transfers generally incompatible with their governing arrangement. Their jurisdiction is limited by the lack of a defined land and resource base, and by the weakness of authority for the exercise of that jurisdiction, which is likely to be delegated from other governments, either Aboriginal or non-Aboriginal.

Instead, community of interest governments are likely to function more as urban-based institutions delivering programs in the areas of education and social

services. Services delivered by municipal and community of interest governments in an urban setting will necessarily have effects beyond their individual jurisdictions, given that all residents – Aboriginal and non-Aboriginal – share the same territory. To account for these potential external circumstances, funding involving conditional transfers would ensure that a basic level of compatibility with services being offered in an urban area is met, while at the same time allowing community of interest governments to control the delivery of these services to reflect the special needs of Aboriginal people. Thus, the intergovernmental fiscal transfers received by community of interest governments would be primarily conditional.

Exploring all these transfers in more detail, we see that those of an unconditional cash nature would need to allow for adjustments to account for both the fiscal capacity and the actual cost of delivering public services. There is also the possibility that unconditional cash transfers could form a component of the finances available to a community of interest government, perhaps to cover overhead costs of administration. Other unconditional transfers, such as revenue-sharing, grants in lieu of taxes, and northern and isolation allowances, are compatible with the nation and public models. (The rationale for this expenditure needs component, which is a feature of federal-territorial transfers but not a feature of current federal-provincial transfers, was discussed earlier.)

As for conditional transfers, both types – program-conditional and spending-conditional – are available to Aboriginal government of any type. As a general rule, conditional transfers are compatible when the programs or activities they are designed to fund have effects beyond the jurisdiction of the recipient government, or when they are directed at financing large capital projects. In the case of the community of interest model, especially when operating as a single-function government on the basis of delegated authority, conditional transfers are likely to be a primary source of funding.

### *Entitlements from treaties and land claims settlements*

This third funding source is unique to Aboriginal governments and arises from specific claims settlements, comprehensive land claims settlements and treaty land entitlement. These sources of funding are available almost exclusively to nation governments – to nations that have treaties with the Crown, to those engaged in specific-claims processes, and to those that have not yet made treaties. In terms of specific claims, feasibility will depend on whether any monies are owed as part of the treaty obligations or claims settlement. However, as we argued earlier, such funds should not be considered a direct source of funding for these Aboriginal governments.

Nor should any treaty entitlements, such as education entitlements, affect the calculation of the Aboriginal government's fiscal capacity. Moneys flowing from these sources would likely provide only indirect funding for Aboriginal governments. These distinctions would need to be accounted for in determining own-source revenues for purposes of calculating fiscal transfers from other gov-



ernments. In the case of comprehensive land claims settlements, for example, a payment of funds associated with the settlement should not be considered a direct, own-source of funding for Aboriginal governments.

### *Borrowing authority*

Finally, borrowing to finance capital expenditures, through public offerings or loans from financial institutions, is a funding instrument that is compatible with both the nation and the public model of government. The ability of these governments to use borrowing instruments will depend on their asset base, the stability of their political and fiscal arrangements, and their continued ability to raise own-sources of revenue.

Aboriginal governments based on the community of interest model, in the absence of a defined land base and a consolidated government structure, are more restricted in their ability to use borrowing instruments. We expect that other governments, notably those based on the nation model, will play an instrumental role in meeting the capital expenditure needs of this form of Aboriginal government.

## **Toward a Canada-wide framework for fiscal relations among the three orders of government**

Financial arrangements to support the functioning of a system of government are rarely the product of a single grand design drawn up at a particular time. The number and variety of factors to consider in such arrangements are so broad and diverse that it would be impossible, in theory or in practice, to design a 'once-and-for-all' fiscal master plan that would meet the needs of all citizens and adapt to changing circumstances over time. On the contrary, financial arrangements are inevitably the product of extensive and continuing discussions and negotiations among the officials and elected representatives of the affected governments, who are in the best position to understand the needs of their citizens and to determine what workable arrangements will best equip governments to deal with these demands and responsibilities.

In terms of financing Aboriginal governments under the new relationship, negotiations to develop particular arrangements will occur in two stages. The first step will be the negotiating process discussed here, aimed at establishing a Canada-wide framework to set up the general fiscal relationship among the three orders of government – Aboriginal, federal and provincial. While these negotiations are going on, interim financial arrangements should be made for recognized nations to exercise their core powers. In the second step, building on the Canada-wide framework, negotiations will proceed at the level of individual Aboriginal nations through treaty processes (outlined in Chapter 2) to work out the fiscal arrangements particular to their circumstances and in accordance with the form of government through which they choose to exercise their inherent right of self-government.



Although First Nation people have been invited to partnership we still do not have the resources to implement our traditional ways.

Norma Shorty

Kwanlin Dun First Nation

Whitehorse, Yukon, 18 November 1992

Having considered the design of financial arrangements that would be appropriate for individual Aboriginal governments – as they are realized through nation, public or community of interest models of governance – we turn now to the broader fiscal relationship that these governments, collectively, will share with other governments in Canada.

In federal systems, individual constituent governments are rarely completely self-financed. Many areas of responsibility are shared by two orders of government and therefore require joint financing arrangements. As well, there is often a gap between the fiscal needs of governments and their fiscal capacity, requiring a system of intergovernmental subsidies and grants. In Canada, these kinds of fiscal relations, involving both federal and provincial governments, are currently realized through an umbrella framework called the *Federal-Provincial Fiscal Arrangements and Federal Post-Secondary Education and Health Contributions Act*.<sup>261</sup> We will now identify some of the key elements that should govern the design and operation of a fiscal framework for Aboriginal governments.

### *Objectives of a framework agreement for financing Aboriginal governments*

The framework should be prefaced by a statement of fundamental objectives for making Aboriginal self-government operational and for the financing of Aboriginal governments. This statement, in turn, should be reflected in the design of fiscal arrangements. In this regard, we offer the objectives of self-reliance, equity, efficiency, accountability and harmonization as a starting point for these negotiations. Moreover, this statement should specify the various commitments of the Aboriginal, federal and provincial governments in fulfilling these objectives.

### *Transfer regime*

At the core of the framework is the development of a regime to govern how fiscal transfers are effected between and among the three orders of government. This regime could comprise the following elements: purpose, nature of receipt, form and basis of calculation.

The transfer regime should specify the purposes to which particular transfers should be directed:

- financial assistance for Aboriginal governments in terms of the general operations of government, infrastructure and so on;
- financial assistance in specific policy or program areas, for transition purposes and/or on a continuing basis;
- availability of financial resources to meet the equity principles articulated in section 36 of the *Constitution Act, 1982*;
- availability of financial resources to meet the regional development principles articulated in section 36 (“furthering economic development to reduce disparity in opportunities”); and
- the application of tax immunity to Aboriginal governments, so that they cannot be taxed by the federal and provincial governments; or
- the eligibility of Aboriginal governments for grants in lieu of taxes from the federal and provincial governments (for example, for highway maintenance, federal and provincial property).

The transfer regime should identify the nature of receipt (conditional or unconditional) for transfers directed to Aboriginal governments. There should be explicit criteria to determine when conditional transfers are appropriate, the manner in which conditions will be identified and how they will be enforced. The nature of receipt should include the principle that as the political and jurisdictional autonomy of an Aboriginal government increases, the proportion of transfers that are conditional in nature should fall.

The regime should also determine the forms in which fiscal transfers will be realized: cash payments, revenue-sharing, grants in lieu of taxes, and northern or isolation allowances.

Finally, the transfer regime should develop a formula to calculate the magnitude of transfers received by particular Aboriginal governments. In addition to the relevant factors considered in typical federal-provincial fiscal transfer formulas, consideration should be given to

- transition and start-up costs for Aboriginal governments established under the renewed relationship;
- the range of own-source revenues particular to the Aboriginal governments to be included;
- the costs borne by Aboriginal governments in the delivery of programs and services (that is, the needs-basis);
- catch-up (equalization) grants and subsidies; and
- equalization offset payments.

### *Co-ordination mechanisms and agreements*

In addition to the development of a transfer regime, the framework should allow for the harmonization and co-ordination of other shared fiscal arrangements

through various mechanisms and agreements. A key issue is the negotiation of tax-sharing agreements to co-ordinate the taxing activities of the Aboriginal, federal and provincial orders of government where they share a common tax base and to allow for the collection of certain Aboriginal government taxes (for example, personal income and corporate taxes) by other orders of government when efficiencies can be realized through greater economies of scale.

### *Implementing the framework*

The framework, once negotiated by representatives of federal and provincial governments and national Aboriginal peoples' organizations, should be recognized in a political accord signed by all parties.

## RECOMMENDATION

The Commission recommends that

Canada-Wide  
Framework 2.3.26

- Federal and provincial governments and national Aboriginal organizations negotiate
- (a) a Canada-wide framework to guide the fiscal relationship among the three orders of government; and
  - (b) interim fiscal arrangements for those Aboriginal nations that achieve recognition and begin to govern in their core areas of jurisdiction on existing Aboriginal lands.

## 4. TRANSITION

So far, we have focused our discussion of governance on what must be done to establish a renewed and constructive relationship between Aboriginal peoples, their governments and the other orders of government in Canada. It is important to consider how the transition to this renewed federalism can be made. We conclude the chapter by dealing with transition and capacity-building issues – the 'how' questions.

We consider these from the perspective of Aboriginal peoples, as they realize their nationhood, and that of Canadian governments. First, we develop recommendations concerning how to launch the restructured relationship between Aboriginal peoples and Canada and what transitional steps should be taken on the road to self-government. Next, we discuss strategies for Aboriginal people to rebuild their communities and nations and to ensure that their gov-

ernments have the capacity to be good governments. Third, we recommend changes in the structure of the government of Canada necessary to launch and sustain the renewed governing relationship. Finally, we address the issue of the Aboriginal peoples' representation in the institutions of the Canadian federation.

## 4.1 Transitional Measures on the Road to Self-Government

How might we begin to clear a path for Aboriginal peoples to set about the enormous undertaking before them? We see the task in the area of governance as building or rebuilding Aboriginal nations, including financial and administrative support, until they are able to become more economically self-sufficient and administratively autonomous; creating a jurisdictional space within which they can start to act as one of three orders of government instead of as the delegates of the existing orders; and assuring them an adequate land and resource base upon which economic self-reliance and local autonomy can be based.

Each of these actions, which must result from the initiative of Aboriginal peoples themselves, will obviously require the assistance of the other orders of government. Those orders have been the beneficiaries of the lapse in Aboriginal government over the past century and a half and now purport to occupy all the law-making space and to control the vast majority of the land and resources in Canada. There may also be a legal requirement, in the form of the Crown's fiduciary obligation, for the federal and provincial governments to assist in repairing the damage caused to Aboriginal nations.

In short, the question arises as to how Canada might assure Aboriginal peoples the assistance they want in a way that does not impede or overly restrict Aboriginal peoples in the exercise of their rights. This section sets out our ideas about how this might occur. We foresee a process comprising four distinct but related elements that will clear the path for Aboriginal self-governance:

1. the promulgation by the Parliament of Canada of a royal proclamation and companion legislation to implement those aspects of the renewed relationship that fall within federal authority;
2. activity to rebuild Aboriginal nations and develop their constitutions and citizenship codes, leading to their recognition through a proposed new law, the Aboriginal Nations Recognition and Government Act;
3. negotiations to establish a Canada-wide framework agreement to set the stage for the emergence of an Aboriginal order of government in the Canadian federation; and
4. the negotiation of new or renewed treaties between recognized Aboriginal nations and other Canadian governments.



## A royal proclamation and companion legislation

As the first step, the Crown would issue a royal proclamation declaring in unequivocal terms the fundamental principles that will guide the Crown in its future relations with the Aboriginal peoples and nations of Canada. The new royal proclamation would elaborate on and supplement the original principles set out in the landmark *Royal Proclamation of 1763*. It would acknowledge the errors and injustices of the past, recognize Aboriginal nations as possessing the right of self-determination in the form of the inherent right of self-government within the Canadian federation, affirm a continuing commitment to the historical and modern treaties and to the treaty process, and outline a contemporary legislative program to restore the relationship between Aboriginal peoples and the Crown on a foundation of mutual respect. The proclamation would follow upon extensive consultations with Aboriginal peoples and provincial and territorial governments. We described this proclamation in some detail in Chapter 2 and recommended its adoption by the Parliament of Canada. We return to the subject in Volume 5, where we propose a strategy for implementing this report.

Our proposed approach also involves enacting federal companion legislation to commit government to assist new or restored Aboriginal nations to emerge from their present state of fragmentation. This legislation would include the following:

- an Aboriginal Treaty Implementation Act to commit the federal Crown to the treaty renewal and treaty-making processes, to enable its participation in the treaty commissions that would facilitate and oversee the treaty negotiations, and to establish general guidelines for the ensuing negotiations on the reallocation of lands and resources to Aboriginal nations. We discuss these approaches in Chapters 2 and 4 of this volume;
- an Aboriginal Lands and Treaties Tribunal Act to establish and empower a tribunal to deal with specific claims and assist the treaty process. We discuss these measures in detail in Chapter 4;
- an Aboriginal Relations Department Act and an Indian and Inuit Services Department Act to create new federal departments to discharge federal Crown obligations to recognized Aboriginal nations and replace the existing Department of Indian Affairs and Northern Development;
- an Aboriginal Parliament Act to establish a new federal Aboriginal institution;
- amendments to the *Canadian Human Rights Act* to create mechanisms to inquire into harms to Aboriginal peoples and communities as a result of relocations; this recommendation was developed in Volume 1, Chapter 11; and
- an Aboriginal Nations Recognition and Government Act to provide a means for Aboriginal people and communities to come together and obtain federal recognition as nations. This act would amend the *Indian Act* to exclude these nations from provisions that no longer apply as they gain access to their self-government powers, and to provide access to the financial resources recog-

nized Aboriginal governments will need to begin building their government infrastructure before exercising their full self-government powers as a result of the treaty processes.

We discuss most of these proposals elsewhere in this volume. What follows is confined to the proposed Aboriginal Nations Recognition and Government Act. This federal legislation will formally acknowledge the existence of Aboriginal nations and establish the criteria and process for recognition. Some fundamental principles are associated with this proposal, which are based on our conception of Aboriginal nations:

- A broad and flexible standard of Aboriginal nationhood should be embraced, emphasizing the collective sense of Aboriginal identity, shared by a sizeable body of Aboriginal people, and grounded in a common heritage.
- Aboriginal groups might assert their modern nationhood in a variety of ways, incorporating, among other things, modern political affiliations.
- Nationhood is linked to the principle of territoriality. This principle does not require exclusive territorial rights and jurisdiction for an Aboriginal nation and its government to exercise the inherent right of self-governance.
- Except for rare exceptions, Aboriginal nations are not synonymous with *Indian Act* bands or small communities.
- One formula for self-government cannot be expected to satisfy the interests and needs of every Aboriginal nation or meet the requirements for its relations with the other two orders of government.

The proposed recognition and government act would prescribe how the government of Canada would give formal recognition to Aboriginal nations and make explicit what is implicit in section 35 of the *Constitution Act, 1982*, namely that those nations have an inherent right of self-government. The legislation would provide that Aboriginal nations, once recognized, may exercise on their existing territories the law-making capacity they deem necessary in the transition period in core areas of jurisdiction vital to the life and welfare of their people and to their culture and identity. Under this legislation, the federal government would vacate its relevant legislative authority under section 91(24) in such core areas. Further, the act would identify which federal areas of jurisdiction the Parliament of Canada is prepared to acknowledge as being core. The federal government would make a commitment to provide recognized Aboriginal nations with financing commensurate with the scope of the jurisdiction in core areas that they propose to exercise and to help them prepare for renewed treaty negotiations.

To promote greater co-operation and certainty, the government of Canada would negotiate with the provinces and Aboriginal representatives, in the context of the Canada-wide framework agreement, an interim agreement on the core powers that Canadian governments are prepared to acknowledge that Aboriginal

nations could exercise once they are recognized. This would reduce the risk of legal conflict. Short of an agreement with all the provinces, the government of Canada would proceed with those provinces that were ready to act.

The full extent of these law-making powers and their application to expanded Aboriginal territory in both core and periphery areas would ultimately be negotiated with the federal and provincial governments in the context of the Canada-wide framework agreement and in the subsequent treaty negotiation.

Although we are proposing *recognition* legislation, Aboriginal nations do not require federal (or provincial) legislation to have the constitutional authority to function as governments. That authority, it will be recalled, has its source outside the Canadian constitution, although it is recognized and affirmed in it. What we are proposing, therefore, is simply legislation to make this explicit and to offer guidance to Aboriginal nations and to Canadian governments on how to facilitate the re-emergence of self-governing Aboriginal nations. To make the context of this legislation clear, it would be useful to have a provision that any law-making powers assumed by recognized Aboriginal nations are not to be construed as contingent, delegated or limited, unless limitations are agreed to through negotiations with the other two orders of government.

The Aboriginal Nations Recognition and Government Act would also clarify other important matters. Among them, federal, provincial and territorial laws would continue to apply to Aboriginal people unless and until displaced by a law passed by a recognized Aboriginal nation acting within its proper sphere of inherent law-making authority. It might also be useful to add a non-derogation provision. This would assure Aboriginal people that recognition will have no impact on existing Aboriginal or treaty rights except to the extent agreed upon through subsequent negotiations.

The most important function of the recognition legislation would be to establish the criteria for formal recognition of Aboriginal nations and the process by which this would take place.

## Rebuilding and recognizing Aboriginal nations

As a second element of the transition, we see the process for seeking recognition under the Aboriginal Nations Recognition and Government Act unfolding in three broad stages: (1) a preliminary organizational stage; (2) the stage of preparing an Aboriginal nation's constitution and seeking the endorsement of its citizens; and (3) the stage of seeking recognition under the proposed legislation.

### *Stage 1: Organizing for recognition*

Preliminary consultations with each community could be undertaken by local communities themselves or by larger organizations representing more than one community, a regional or even a national population of Aboriginal people.



Tribal councils, provincial associations of *Indian Act* bands and self-governing groups under delegated authority (such as the James Bay Cree and Naskapi), treaty nations, Inuit regional governments or the provincial Métis associations come to mind. Regardless of who begins it, the process of grouping and regrouping scattered elements to rebuild a nation will have to begin from within. The recognition process we foresee is primarily self-directed.

A preliminary step would be for local communities to hold referendums or some other mechanism of community approval to authorize representatives to take the first steps in organizing the nation's institutions, with a view to being recognized. At this first stage, eligibility to vote would, of necessity, be restricted to current members of the community. Thus, in the case of *Indian Act* bands, those eligible to vote would be all band members, including off-reserve members. Where a band operates according to the *Indian Act*, which restricts voting to on-reserve members, it should use custom to enlarge its list of eligible voters for this initial vote to include all members, regardless of residency. In the case of non-status Indian communities, such as the Mi'kmaq in the province of Newfoundland, and Inuit and Métis communities, the list of eligible voters should include everyone considered to be a community member, regardless of where such persons reside.

When a referendum is used rather than a consensus-building approach, we recommend that at least one-third of eligible voters must vote for the referendum to be valid; then, a simple majority of 50 per cent plus one of those actually voting would be sufficient to carry the referendum.

Having received a mandate to pursue recognized nation status, the initiating communities or organization would be in a position to seek funding and other governmental assistance. Funding should be based on a readily understood formula and be used to enable the elements of the Aboriginal nation, be they representatives of communities or of other organizations, to come together to discuss the many items that will have to be resolved; to enumerate all potential citizens of the Aboriginal nation and to inform them how to apply for citizenship; to engage technical and other assistance where required to begin the process of developing a constitution and a citizenship code; to lay out the possible structures of the nation and its government; and to facilitate the internal healing necessary for the successful completion of these preliminary tasks. An important part of this stage will be to begin the healing process in Aboriginal communities where political cohesion has been fragmented.

One of the most important tasks at this stage will be enumerating the nation's potential citizens. For those directly affected by the *Indian Act*, this poses a particular challenge. As discussed in Volume 1, Chapter 9 and Volume 4, Chapter 2, membership has been and remains a contentious issue in many reserve communities. There were real problems with both the substance of Bill C-31 and its implementation. Unfortunately, it appears from the evidence presented to the



Commission that sexual discrimination and fundamental unfairness continue to be problems in the status and membership provisions of the *Indian Act* and in their application, despite the 1985 amendments.

Self-government within section 35 of the *Constitution Act, 1982* is subject to the requirement in subsection (4) of equality between the sexes. Ultimately, the artificial and unfair distinctions between status and non-status Indians under the *Indian Act* should be eliminated once Aboriginal nations are properly constituted with all their eligible members. Funding arrangements for Aboriginal nations will no longer be based on such distinctions or on the formulas now used by federal officials that discourage Indian communities from including a broader range of persons in their membership.

Thus, in this first stage in the recognition process, the errors and injustices of past federal Indian policy should be corrected by identifying candidates for citizenship in the Aboriginal nation that include not only those who are currently members of the communities concerned, but also those who desire to be members of the nation and can trace their descent from or otherwise show a current or historical social, political or family connection to a particular community or nation. From this enlarged pool of potential citizens of the Aboriginal nation, an appropriate citizenship code could make rational and defensible distinctions based on the principles contained in the *Constitution Act, 1982*, subsection 35(4), the *Canadian Charter of Rights and Freedoms*, and international human rights instruments.

This task in some cases will undoubtedly give rise to controversy. Potential citizens should be informed as early as possible of the process under way. All those seeking citizenship will be required to indicate the circumstances that give rise to their claim. The requirement to offer evidence of descent or connection to the emergent nation should be reasonable, bearing in mind that written records or other documentary forms of evidence are often not available.

### *Stage 2: Preparing the nation's constitution and seeking its endorsement*

We see the constitution of a recognized Aboriginal nation containing several elements: a citizenship code; an outline of the nation's governing structures and procedures; guarantees of rights and freedoms; and a mechanism for constitutional amendment.

A draft constitution should incorporate a citizenship code that is fair and in harmony with Canadian and international standards (this will have been determined earlier in the nation-rebuilding process). Although domestic and international law in this area is still in its formative stage, there is a small body of case law as well as many statements of principle that together would provide guidance in drafting citizenship codes. Care must be taken to abide by the spirit and intent of domestic and international law and principle, rather than relying on

narrow interpretations, for example, to suit the views of a small minority that may now be enjoying the advantages of recognized membership under the *Indian Act*. If a citizenship code is overly exclusive, this could be grounds for a recognition panel, established under the provisions of the proposed Aboriginal Lands and Treaties Tribunal (see Chapter 4), to recommend against recognition and propose steps to make the code more inclusive.

Aboriginal people with a rational connection to a particular community or nation, whatever their current residence or circumstances, should be given a fair opportunity to acquire citizenship, should they so desire, according to fair standards fairly applied. A nation's code would be applied by an impartial body or bodies selected by the membership of the initiating communities or organization. The task of applying the code justly will be an onerous one, and we urge selection of persons with broad vision and the greatest integrity. It will also be crucial to develop an appeal mechanism to ensure that citizenship decisions are subject to a second impartial review. Indeed, the existence of an appeal process should be a condition of recognition in the recognition act. The appeal mechanism should be at the nation level rather than the community level. A nation-level appeal mechanism will ensure consistency of decisions between and across communities.

In the second stage, developing the citizenship code and the bodies to apply it will be one of the first tasks in moving toward recognition. Those deemed to be citizens through these processes will participate in drafting and ratifying a nation's fundamental laws or constitution. The structure of government and how it will function may also be set out clearly in the draft constitution. The paramount consideration will be the presence of internal checks and balances to ensure the smooth running of the proposed government. Many traditional governance systems contain just such mechanisms, and we will not make specific recommendations in this regard. Obviously, one of the challenges facing modern Aboriginal nations will be adapting traditional mechanisms to modern conditions.

In any event, the constitution should contain an outline of the governing structures and their rules and procedures. It should also provide for a system of impartial and independent review of the executive or administrative decisions of the government and public officials. The grounds for review should include alleged illegalities under the constitution and applicable laws, and unreasonableness or lack of fairness in substance or procedure. Citizens need to have a way of challenging government actions without resorting to civil disobedience or other socially disruptive forms of protest. In this regard, the draft constitution could also contain mechanisms for removing elected and appointed officials from office and identify the grounds for their removal.<sup>262</sup>

Although the *Canadian Charter of Rights and Freedoms* will protect the individual rights of citizens, if Aboriginal nations develop their own charters or recognize conventions or traditional practices that would offer interpretive assistance

in applying Canadian Charter protections, these should also be set out in a nation's constitution. Finally, a constitution should contain a provision describing how it can be amended as well as a description of the territory over which the Aboriginal nation will exercise governance.

At all stages of development of a draft constitution, the process must be an open one to ensure that all views are canvassed. Persons who have become citizens at this stage of the process should have an opportunity to take part in discussions on preparing a draft constitution. A number of approaches could encourage broad participation: questionnaires could seek the views of all concerned; the draft constitution could be circulated to all citizens; discussion of the draft constitution could occur through community- and nation-based media; and a variety of ratification procedures could be used to address the circumstances of different groups. For example, provisions could be made for mail-in voting, and voting facilities could be established in urban centres.

A draft constitution should be subject to a 'double majority' standard of ratification before it is adopted. The draft constitution would be presented for approval in a referendum to all individuals who are citizens. Given the historical policies that led to the forced removal or emigration of community members from their home communities, it is likely that the citizenry accepted under the citizenship code will be larger than the total membership of the individual communities that have come together to seek recognition.

Given the importance of the matters being voted on, we recommend that at least 40 per cent of eligible voters vote before a referendum is considered valid and that 50 per cent plus one be needed to achieve the first of the double majority requirements.

As a second requirement of the double majority ratification process, we propose that acceptance of a draft constitution require the approval of a majority in each of the communities that have come together to seek recognition. The objective of this requirement is to preserve the primacy of established communities in the important decisions that will have to be made on the road to recognition.

In our view, a majority of those voting in a community would have to approve the constitution for that community to participate in the new nation government, and a strong majority of communities, say 75 per cent, would be required to ratify the package before the double majority could be said to have been met. Communities that do not decide to join an Aboriginal nation will remain under current *Indian Act* arrangements but will be entitled to join the nation at any time in the future.

To sum up, a draft constitution would be considered adopted as drafted if 40 per cent of the eligible voters participated in the referendum; if the constitution was approved by 50 per cent plus one of those eligible voters across the nation as a whole (the first majority); and if a simple majority of those voting

in each community approved the constitution in 75 per cent of the communities (the second majority).

It may also be advisable, given the extreme importance of the ratification stage, that the entire double majority voting process be monitored by outside observers. In this regard, observers from other Aboriginal nations or Elections Canada officials could assist. The important thing will be to ensure due process.

### *Stage 3: Getting recognition*

Assuming that a nation's constitution is approved and the decision to seek recognition under the Aboriginal Nations Recognition and Government Act is endorsed, the third stage would be an application for recognition. In our view, application for recognition should be made to a neutral body, a recognition panel appointed by, and operating under, the proposed lands and treaties tribunal. The panel would consist of a minimum of three persons, the majority of whom would be Aboriginal. It would have broad investigative powers to ensure that the criteria for recognition established in the Aboriginal Nations Recognition and Government Act had been met and that fundamental fairness had been observed in the processes leading to the application.

The authorized representatives of an Aboriginal nation would submit to the recognition panel a draft of their proposed constitution along with evidence that the referendum had been held and that citizens had given their consent. The recognition panel would make a recommendation to the governor in council (the cabinet) once it had reviewed the application against established criteria. If, for any reason, the panel recommended against recognition, the panel would provide reasons for its recommendation and guidance on how its concerns might be addressed. Although the government would not be obliged to accept the panel's recommendation, it would have to have compelling reasons not to do so and should be required to state those reasons publicly. Recognition would be accomplished by an order in council published in the *Canada Gazette*.

The Aboriginal Nations Recognition and Government Act should amend the *Indian Act* to clarify that the provisions of the *Indian Act* would apply to a recognized Aboriginal nation exercising powers under section 35 of the *Constitution Act, 1982*, but only to the extent the nation wishes.

We make no particular recommendation regarding the amendment or repeal of the *Indian Act*. The future of this act, and particularly the issue of lands, resources and the fiduciary obligation that attaches to reserve lands under the *Indian Act*, are matters that should be subject to negotiations. As a practical matter, withdrawal from the *Indian Act* regime should be phased to provide an appropriate transition period for bands that become part of recognized Aboriginal nations under the proposed recognition and government act. Once recognized, a nation government should receive enhanced funding to exercise expanded



powers for its increased population base. In the longer term, the exercise of powers by Aboriginal nations and their governments will be dealt with through the comprehensive treaties that we see as the end products of negotiations between the federal and provincial governments and recognized Aboriginal nations. These agreements will be ratified by Parliament and the relevant provincial legislatures, so as to be binding on Canada and the provinces, and, as treaties, will have constitutional protection.

## RECOMMENDATION

The Commission recommends that

### Aboriginal Nations 2.3.27

Recognition and  
Government Act

The Parliament of Canada enact an Aboriginal Nations Recognition and Government Act to

- (a) establish the process whereby the government of Canada can recognize the accession of an Aboriginal group or groups to nation status and its assumption of authority as an Aboriginal government to exercise its inherent self-governing jurisdiction;
- (b) establish criteria for the recognition of Aboriginal nations, including
  - (i) evidence among the communities concerned of common ties of language, history, culture and of willingness to associate, coupled with sufficient size to support the exercise of a broad, self-governing mandate;
  - (ii) evidence of a fair and open process for obtaining the agreement of its citizens and member communities to embark on a nation recognition process;
  - (iii) completion of a citizenship code that is consistent with international norms of human rights and with the *Canadian Charter of Rights and Freedoms*;
  - (iv) evidence that an impartial appeal process had been established by the nation to hear disputes about individuals' eligibility for citizenship;
  - (v) evidence that a fundamental law or constitution has been drawn up through wide consultation with its citizens; and
  - (vi) evidence that all citizens of the nation were permitted, through a fair means of expressing their opinion, to ratify the proposed constitution;

- (c) authorize the creation of recognition panels under the aegis of the proposed Aboriginal Lands and Treaties Tribunal to advise the government of Canada on whether a group meets recognition criteria;
- (d) enable the federal government to vacate its legislative authority under section 91(24) of the *Constitution Act, 1867* with respect to core powers deemed needed by Aboriginal nations and to specify which additional areas of federal jurisdiction the Parliament of Canada is prepared to acknowledge as being core powers to be exercised by Aboriginal governments; and
- (e) provide enhanced financial resources to enable recognized Aboriginal nations to exercise expanded governing powers for an increased population base in the period between recognition and the conclusion or reaffirmation of comprehensive treaties.

### A Canada-wide framework agreement

The third element necessary to establish Aboriginal nations as one of three orders of government is a Canada-wide framework agreement to guide the development of subsequent treaties and self-government agreements between recognized Aboriginal nations and the federal and provincial governments.

The development of this framework agreement would involve broad and sustained consultations between the federal and provincial governments and the representatives of Aboriginal peoples. This process should begin within six months after the publication of this report and should be a prominent feature of a special first ministers conference we believe should be called early in 1997 to consider implementation of this report. A final, Canada-wide framework agreement should be in place no later than the year 2000 if positive momentum is to be maintained and if federal and provincial good faith toward Aboriginal peoples is to be demonstrated.

It will be vital that adequate financing be made available to the national Aboriginal organizations to enable them to consult properly with and adequately represent their member populations and communities during the process of developing the framework agreement. These funds should be provided according to a reasonable and generally agreed basis of calculation. The willingness of the existing two orders of government to provide financial assistance at this early stage will be a barometer of the commitment of Canadians to the process.

The framework discussions should have three primary purposes: to achieve agreement on the areas of Aboriginal self-governing jurisdiction; to provide a

policy framework for fiscal arrangements to support the exercise of such jurisdiction; and to establish principles to govern negotiations on lands and resources and on agreements for interim relief with respect to lands subject to claims, to take effect before the negotiation of treaties.

Concerning the first purpose, what are the potential areas of Aboriginal jurisdiction that would be listed in the Canada-wide framework agreement? The following is a tentative list of the areas of self-government that we see accruing to recognized Aboriginal nations, pursuant to their inherent right. This list includes examples of the core and peripheral jurisdiction discussed earlier in this chapter. It was derived from the scope of section 91(24) and the implied principles reflected in section 35 of the *Constitution Act, 1982* as refined by the *Sparrow* test. It is evident that not every Aboriginal government will wish to have access to all these areas of jurisdiction. Some may choose to exercise them later. This list is a suggested starting point for the negotiations that must occur if the framework agreement is to encompass the extent of Aboriginal nations' law-making powers:

- constitution and governmental structures
- citizenship
- elections and referendums
- access to and residence in the territory
- lands, waters, sea-ice and natural resources
- preservation, protection and management of the environment, including wild animals and fish
- economic life, including commerce, labour, agriculture, grazing, hunting, trapping, fishing, forestry, mining, and management of natural resources in general
- operation of businesses, trades and professions
- transfer and management of public monies and other assets
- taxation
- family matters, including marriage, divorce, adoption and child custody
- property rights, including succession and estates
- education
- social services and welfare, including child welfare
- health
- language, culture, values and traditions
- criminal law and procedure
- the administration of justice, including the establishment of courts and tribunals with civil and criminal jurisdiction
- policing
- public works and housing
- local institutions

The second purpose of the Canada-wide framework agreement will be to establish a policy framework for fiscal arrangements to support the exercise of those powers once the treaty process has been completed. The policy framework must flow from and reflect the principles we suggest for new financial arrangements:

- A renewed relationship requires fundamentally new fiscal arrangements in which the accountability procedures for Aboriginal nations are not more onerous than those imposed on the federal and provincial governments.
- The fiscal and political autonomy of Aboriginal nations should grow together, so that as they become more politically and administratively autonomous, the share of federal and provincial transfer payments that is conditional diminishes.
- Financial arrangements should provide greater fiscal autonomy for Aboriginal governments by increasing their access to independent own-source revenues founded on the fair and just distribution of lands and resources to Aboriginal nations and enhanced economic development and the development of their own systems of taxation.

The third purpose of the agreement should be to establish the principles on which a fair and just distribution of lands and resources to Aboriginal nations can be accomplished. Negotiations concerning lands and resources must accompany self-government and fiscal negotiations if they are to be accomplished within a reasonable time and produce acceptable results for Aboriginal nations that will give them the measure of autonomy due to them in a renewed federation. In the next chapter we outline the principles that must guide these negotiations – principles that should be reflected in the framework agreement:

- Aboriginal title is a real interest in land that contemplates a range of rights with respect to lands and resources and is recognized and affirmed by section 35(1) of the *Constitution Act, 1982*.
- The Crown has a special fiduciary duty to protect the interests of Aboriginal peoples, including Aboriginal title, requiring it to protect the Aboriginal land and resource rights fundamental to Aboriginal economies and to the cultural and spiritual life of Aboriginal peoples.
- Blanket extinguishment of Aboriginal land rights will not be required in exchange for rights or other benefits contained in an agreement, and partial extinguishment of Aboriginal land rights will not be made a precondition for negotiating agreements but will be considered only after careful and exhaustive analysis of alternatives.
- All agreements regarding lands and resources will be subject to periodic review and renewal.
- Agreements regarding lands and resources will contain dispute resolution mechanisms tailored to the circumstances of the parties.



For additional clarity, and to allay any possible suspicions regarding the intent of the federal and provincial governments, the Canada-wide framework agreement should also contain a clear statement to the effect that the requirement to negotiate the extent of Aboriginal nation law-making powers is in no way to be construed as considering them contingent powers dependent on the delegation of federal, provincial or territorial law-making authority.

Transition from Aboriginal dependency on federal and provincial governments to greater political autonomy will be neither swift nor without obstacles and problems. Accordingly, it might also be useful for the framework agreement to provide for interim arrangements that would be without prejudice to the long-term negotiations. Existing jurisdictional arrangements could be preserved, or Aboriginal nation self-government powers could be implemented in stages. There are many precedents for such arrangements in recently concluded self-government agreements, such as those in the Yukon and Northwest Territories.

The advantage of a framework agreement is that it will provide guidance to the parties in the subsequent treaty negotiations, saving time, effort and expense. It will also encourage greater fairness across Aboriginal nations in treaty negotiations, because nations with less bargaining power can take advantage of provisions negotiated by Aboriginal organizations or nations bargaining from a position of greater strength.

Subsequent negotiations between individual recognized Aboriginal nations and the federal and provincial governments will build on the framework agreement negotiated by the national Aboriginal organizations. For Aboriginal nations that already have treaties, these subsequent agreements may amount to new treaties, implementation and renewal of their original treaties, or protocols regarding interpretation of the original treaties.

---

## RECOMMENDATION

The Commission recommends that

Canada-Wide  
Framework  
Agreement 2.3.28

The government of Canada convene a meeting of premiers, territorial leaders and national Aboriginal leaders to create a forum charged with drawing up a Canada-wide framework agreement. The purpose of this agreement would be to establish common principles and directions to guide the negotiation of treaties with recognized Aboriginal nations. This forum should have a mandate to conclude agreements on

- (a) the areas of jurisdiction to be exercisable by Aboriginal nations and the application of the doctrine of paramountcy in the case of concurrent jurisdiction;
- (b) fiscal arrangements to finance the operations of Aboriginal governments and the provision of services to their citizens;
- (c) principles to govern the allocation of lands and resources to Aboriginal nations and for the exercise of co-jurisdiction on lands shared with other governments;
- (d) principles to guide the negotiation of agreements for interim relief to govern the development of territories subject to claims, before the conclusion of treaties; and
- (e) an interim agreement to set out the core powers that Canadian governments are prepared to acknowledge Aboriginal nations can exercise once they are recognized but before the renegotiation of treaties.

### Negotiation of new or renewed treaties

As a fourth step in the transition leading to full self-government, Aboriginal nations recognized under the Aboriginal Nations Recognition and Government Act may proceed to enter into treaty negotiations with the federal and provincial governments for a new or renewed treaty relationship. These negotiations, described in Chapter 2 of this volume, would include expanding lands and resources over which an Aboriginal nation would have sole control and jurisdiction, and identifying a further area of its traditional territory in which it would have shared jurisdiction with other governments.

Having passed through the recognition process, Aboriginal nations would also be able to negotiate directly with the federal and provincial governments in political and constitutional forums for redress of their historical grievances without arousing concerns about representation and membership issues that were evident during the constitutional discussions in the 1980s or that have reached the courts more recently. For example, a single Métis nation or several Métis nations might emerge from this process. Métis people would no longer have to justify their collective presence and explain what they believe their self-government rights to be. They would be able to move directly into power- and resource-sharing negotiations with federal and provincial governments.

At this stage, Aboriginal nations would be entitled to enter into fiscal transfer arrangements as negotiated under the framework agreement with the federal and provincial governments. The scale of funding will be related to the scope of powers to be exercised by an Aboriginal nation and the corresponding services

to be delivered within the limits negotiated in the Canada-wide framework agreement.

Although jurisdiction over core areas would accrue to Aboriginal nations upon their recognition, no sovereignty is absolute or exclusive in any federation; nor are the law-making powers associated with that sovereignty. For example, the law-making powers of Parliament and the provincial legislatures have undergone a process of harmonization that continues to this day as the Canadian federation evolves and adapts to new challenges and changing economic circumstances. In the same way, the law-making powers of Aboriginal nations will need to be harmonized with those of the federal and provincial governments if the federation is to move forward in a renewed relationship on the basis of consensus and mutual respect.

Following recognition of an Aboriginal nation, there will be great pressure on the federal and provincial governments to arrive at workable arrangements that will satisfy the needs and aspirations of Aboriginal nations, and preserve a strong measure of predictability and co-operation between neighbouring jurisdictions. In the same way, given their need to build a government infrastructure, acquire stable sources of funding, and draw the population together into cohesive and functioning societies, newly recognized Aboriginal nations will be highly motivated to arrive at practical arrangements to make this possible.

The more difficult issues can and should be left for the negotiation process, seen as taking place within the context of the Canada-wide framework agreement, and the subsequent individual treaty negotiations. These include the full scope of potential Aboriginal jurisdiction; the paramountcy to be accorded to Aboriginal or to federal and provincial laws in cases of shared jurisdiction; the exact nature of the long-term system of fiscal transfers; the size and nature of land allocations; and many related issues. These negotiations will culminate in treaties within the meaning of section 35 of the *Constitution Act, 1982*.

In the final analysis, resolving all the issues raised in this chapter will be for the parties – the new partners in Confederation – to achieve. The process described here is intended only as illustration. By definition, a federation is a flexible and evolving entity, and the shape and direction it takes must likewise be somewhat flexible and capable of responding to change. If there is one quality that Aboriginal and non-Aboriginal Canadians have shared historically and continue to share, it is the ability to be flexible, to respond to change, and to look to the future with hope and confidence. It is in this spirit that we offer these suggestions for transition.

## 4.2 Capacity Building: Aboriginal Strategies for the Transition to Self-Government

The Commission's vision of Aboriginal governance is one in which Aboriginal peoples are free to determine the form of political organization and government

that is appropriate for them. To assume their rightful place in this vision, Aboriginal peoples need to have at their disposal tools to ensure their success in reclaiming nationhood, in constituting effective governments, and in negotiating new relationships with the other partners in the Canadian federation.

Earlier in this chapter we identified three basic attributes of effective government: power, legitimacy and resources. We are concerned with the legitimacy of Aboriginal governments, the confidence and support they enjoy, and the resources needed to support them throughout the transition process. Legitimacy will be determined by the way Aboriginal governments are created and structured, the way leaders are selected and held accountable by the people, and the extent to which basic human rights are respected. The capacities of government, especially the people who will propel and steer Aboriginal government, are equally important.

Our discussion of these issues is organized around the capacities and strategies that will be required to effect the transition to a future in which Aboriginal governments are fully functional as one of three orders of government. Throughout the transition process, Aboriginal people will need capacities and strategies that allow them to

- rebuild Aboriginal nations and reclaim nationhood;
- set up Aboriginal governments;
- negotiate new relationships and intergovernmental arrangements with the other two orders of government;
- exercise Aboriginal governmental powers over the longer term; and
- support the building of all these capacities.

## **Capacity to rebuild Aboriginal nations and reclaim nationhood**

The colonial experience and its legacy have touched all Aboriginal people in Canada in some way. The effects of colonialism have been felt not only by individuals, families and communities but also in political structures and activities. This legacy has disrupted many of the institutions essential to Aboriginal governance.

The reclaiming of Aboriginal nationhood is an aspiration actively sought by Aboriginal peoples. It is a key to unlocking Aboriginal autonomy and creates the tools that can be used to reduce dependency, disparity and marginalization and to ensure cultural and political survival.

In practical terms, organizing beyond the community level in the larger political unit of the nation will enable Aboriginal peoples to develop their own laws, institutions and services through governments that command greater power and influence than current community-level arrangements. The aggregated wealth and assets of a nation can be administered for the benefit of the nation as a whole. Duplication of key services, in health and education, for exam-



ple, can be eliminated and improvements in the quality of those services realized when they are redesigned to serve the nation.

Rebuilding and reclaiming nationhood will be a daunting challenge for some Aboriginal peoples but one that we believe can be met through strategies of healing and reconciliation. These strategies must be designed and directed by Aboriginal people themselves, drawing upon their initiative, imagination and energy. While the main responsibility for rebuilding Aboriginal nations rests with Aboriginal people, given the central role played by the Crown in colonizing Aboriginal nations, processes to rebuild them should receive the full support of Canadian governments.

What then can be done by Aboriginal peoples to rebuild their nations and reclaim nationhood? What can Canadian governments do to aid this process? We believe that developing the capacity of Aboriginal peoples to rebuild their nations has to take place at both the community and the nation level and involves two primary but interrelated dimensions: cultural revitalization and healing, and political processes for consensus building.

### *Cultural revitalization and healing*

Cultural education and awareness will be vital to the rediscovery and revitalization of an Aboriginal nation. The objective of these activities and processes is to build strength and self-esteem in nations and to build nation identity. Cultural revitalization might include the gathering and sharing of knowledge about history, languages, traditions, customs and values. These activities can involve all members of an Aboriginal community but would likely require the special participation of elders, teachers and traditionalists.

Such activities might include organizing research and cultural circles; establishing history and language projects; developing profiles of role models; holding meetings with elders; and offering discussion groups for all ages aimed at restoring self-confidence, pride and self-esteem. These activities might be designed for various social groups, such as families, educators, and political leaders, and could be undertaken by single communities or co-operatively by a number of communities that share cultural ties.

Cultural healing and revitalization aimed at reclaiming nationhood will require capacities in research and education, the preparation of teaching materials, and public communication efforts at the community level and beyond. Resources will have to be organized in support of these activities. These processes might dovetail with the implementation of recommendations in other parts of our report – those concerned with education and health and healing in particular. We see a strong link between cultural healing as part of nation building and the recommendations for healing made in Volume 3 of this report, particularly in Chapter 6 on cultural institutions, where we recommend community-level strategies to counter language shift and further erosion of Aboriginal culture and knowledge.

### *Political processes for consensus building*

The types of cultural healing and revitalization activities we describe are central to reclaiming nationhood. But these need to be complemented by a process to develop consensus around re-empowering nations for political and governmental action.

The transition process we proposed assumes the development of consensus, first within the community – because it is at this level that most Aboriginal peoples are organized today – and then at the nation level. All members of Aboriginal communities, including women, elders, elected representatives, teachers, healers, artists and others must be involved in reclaiming their culture and identity and reaching consensus about their political future. Initially, this might involve the sparking of public discussion by groups representing a cross-section of the community or particular segments of the community. Alternatively, individuals from within the community might be appointed or come forward voluntarily to act as facilitators in consensus building and as catalysts in starting the process of public discussion.

These individuals or groups would be responsible for collecting and disseminating information on the nation-building process, determining levels of community interest, identifying concerns about or opposition to the focus on nationhood, and generally facilitating the exchange of views and information.

Special consideration will need to be given to establishing links with community members who live away from the community, who have been excluded from participating in community political and social life because of non-residence, or because of loss of Indian status or their own alienation and distrust of community leaders and political processes.

Efforts should be made to ensure that consensus-building activities are coordinated with cultural healing and revitalization projects and other social healing processes.

Informal processes of information gathering and sharing and consensus building should eventually give way to more formal processes, culminating in confirmation by the community, through a referendum or other ratification process, of the community's desire to participate in further nation-building exercises organized at the nation level and to establish nation-level organizations and leaders to represent their interests.

Preliminary nation-building activities and processes involving communities that share a nation affiliation should be organized on a broader basis, concurrently with those taking place at the community level. These preliminary forums for nation building should be concerned, initially, with planning and organizing nation-level political organizations and structures and with establishing protocols and agreements on Aboriginal nationhood and processes by which communities can join together under the umbrella of an Aboriginal nation.

## RECOMMENDATION

The Commission recommends that

- Rebuilding  
Aboriginal Nations  
and Reclaiming  
Nationhood
- 2.3.29
- Aboriginal peoples develop and implement their own strategies for rebuilding Aboriginal nations and reclaiming Aboriginal nationhood. These strategies may
- (a) include cultural revitalization and healing processes;
  - (b) include political processes for building consensus on the basic composition of the Aboriginal nation and its political structures; and
  - (c) be undertaken by individual communities and by groups of communities that may share Aboriginal nationhood.

Aboriginal communities and nations should have access to financial and other assistance to aid in developing and implementing these processes. Of critical importance to nation rebuilding is the willingness of other governments, notably the government of Canada, to support and assist in a neutral and non-interfering manner in the preliminary and subsequent phases of the transition to Aboriginal self-government.

The Commission proposes the establishment of a national centre to coordinate and oversee the provision of assistance and support to Aboriginal nations in capacity building through all stages of the transition process, from reclaiming Aboriginal nationhood to implementing Aboriginal governments. We believe that this centre will have a significant role to play in supporting preliminary, pre-nation organizational activities at the community level, including cultural revitalization and healing and political consensus-building processes, as well as the emergence of nation-level political structures. While this centre would have a catalytic role in supporting the transition to Aboriginal self-government, we foresee both mainstream and Aboriginal-controlled educational institutions and organizations centrally involved in delivering support services, programs and projects to Aboriginal peoples and governments.

## RECOMMENDATIONS

The Commission recommends that

- Aboriginal  
Government  
Transition  
Centre
- 2.3.30**  
The federal government, in co-operation with national Aboriginal organizations, establish an Aboriginal government transition centre with a mandate to
- (a) research, develop and co-ordinate, with other institutions, initiatives and studies to assist Aboriginal peoples throughout the transition to Aboriginal self-government on topics such as citizenship codes, constitutions and institutions of government, as well as processes for nation rebuilding and citizen participation;
  - (b) develop and deliver, through appropriate means, training and skills development programs for community leaders, community facilitators and field workers, as well as community groups that have assumed responsibility for animating processes to rebuild Aboriginal nations; and
  - (c) facilitate information sharing and exchange among community facilitators, leaders and others involved in nation rebuilding processes.

### 2.3.31

The federal government provide the centre with operational funding as well as financial resources to undertake research and design and implement programs to assist transition to self-government, with a financial commitment for five years, renewable for a further five years.

### 2.3.32

The centre be governed by a predominantly Aboriginal board, with seats assigned to organizations representing Aboriginal peoples and governments, the federal government, and associated institutions and organizations.

### 2.3.33

In all regions of Canada, universities and other post-secondary education facilities, research institutes, and other organizations, in association with the proposed centre, initiate programs, projects and other activities to assist Aboriginal peoples throughout the transition to Aboriginal self-government.



## Capacity to set up governments

Once consensus on the composition of an Aboriginal nation and its political structures has been reached by participating Aboriginal communities, Aboriginal peoples will have to engage in a formal process of setting up their governments. This is the second stage of our proposed process for rebuilding and recognizing Aboriginal nations; it precedes formal recognition under the proposed recognition and government act, but culminates in a mandate to seek formal recognition.

Activities at the nation level will be focused on preparing for recognition. At this stage, development activities and associated capacity requirements will be concerned with

- designing and planning distinctive Aboriginal nation governments and reflecting these in the constitutions and laws of the nations; and
- developing education and communication strategies to ensure community input into constitution development processes and, ultimately, in preparation for ratification of the draft constitution before recognition is sought.

At this stage, Aboriginal people require the capacity to determine the form, key features and dimensions of their governments; to plan and design structures, institutions and procedures; to determine the scope of government operations and how Aboriginal government authority is to be exercised and distributed among different components of the nation; and to define the extent to which traditional forms of political organization will be incorporated or adapted in new or restored Aboriginal governments.

As noted by the Kwakiutl district chiefs, people must be adequately prepared to plan, manage and support such processes.

Community members are their own experts on defining the scope/goals of a treaty and their needs with the process. However, leaders, staff and others engaged in the land and sea question require support in information and skill development to facilitate this definition and planning process. 'How do we get started'; 'What kind of research is necessary' are questions which illustrate expressed concern at community levels.<sup>263</sup>

The planning, design and development of Aboriginal governments will require the capacity to identify and consider options and make informed decisions with confidence; it will also require access to the necessary technical expertise.

## RECOMMENDATION

The Commission recommends that

### Constituting 2.3.34

Aboriginal  
Governments

The Aboriginal government transition centre support Aboriginal nations in creating their constitutions by promoting, co-ordinating and funding, as appropriate, associated institutions and organizations for initiatives that

- (a) provide professional, technical and advisory support services in key areas of Aboriginal constitutional development, such as
  - citizenship and membership;
  - political institutions and leadership;
  - decision-making processes; and
  - identification of territory;
- (b) provide training programs to the leaders and staff of Aboriginal nation political structures who are centrally involved in organizing, co-ordinating, managing and facilitating constitution-building processes;
- (c) provide assistance to Aboriginal nations in designing and implementing community education and consultation strategies;
- (d) assist Aboriginal nations in preparing for, organizing and carrying out nation-wide referenda on Aboriginal nation constitutions; and
- (e) facilitate information sharing among Aboriginal nations on constitutional development processes and experiences.

## Capacity to negotiate new intergovernmental arrangements

Assuming that Aboriginal nations receive recognition under the proposed recognition and government act, they will move to the negotiation phase of the transition to Aboriginal government. They will have been recognized as the political unit capable of exercising the inherent right of self-government.

Nations will undertake two main types of transition activities:

- implementation of Aboriginal nation government, with government activities focused on core areas of jurisdiction and, where appropriate, on retained areas of *Indian Act* governance, on an interim and transitional basis; and

- preparation for the negotiation and subsequent ratification of treaties, including lands and resources agreements, agreements regarding the scope of Aboriginal legislative jurisdiction, in relation to both core and periphery areas, and financial arrangements.

Our focus here is on measures and special initiatives to support negotiation activities. Aboriginal nations will require strategies and capacities for negotiating new relationships and renewing existing relationships with other governments in Canada. This will require the ability to develop consensus around the nature of the relationship to be negotiated or renewed, and to undertake technical negotiations with other governments. We have noted that Aboriginal people and governments already have extensive experience in negotiations and negotiating skills in a broad range of areas. However, we anticipate that this skills base will have to be expanded.

Currently there are few, if any, organized programs for developing negotiating skills. The pool of candidates who can assume positions as negotiators for Aboriginal governments or organizations is accordingly limited. We think that the proposed new national centre and its associated institutions and organizations would have a role to play in this area.

We also believe that the period of negotiation will place special demands on the leaders of Aboriginal nation governments to approve negotiation mandates, support negotiators, and establish and participate in processes to inform their members of developments during negotiations.

## RECOMMENDATION

The Commission recommends that

### Negotiating 2.3.35

#### Capacity

The Aboriginal government transition centre promote, co-ordinate and fund, as appropriate, in collaboration with associated institutions and organizations, the following types of initiatives:

- (a) special training programs for Aboriginal negotiators to increase their negotiating skills and their knowledge of issues that will be addressed through negotiations; and
- (b) training programs of short duration for Aboriginal government leaders
  - to enhance Aboriginal leadership capacities in negotiation; and
  - to increase the capacity of Aboriginal leaders to support and mandate negotiators and negotiation activities, as

well as nation-level education, consultation and communication strategies.

### Capacity to exercise governmental powers over the long term

Immediately following recognition, Aboriginal governments will be in a position to act in what they see as core areas of jurisdiction. However, we anticipate that community-level administrative systems and structures, such as those associated with the *Indian Act*, may remain operative for a period of time, working in parallel and co-operatively with emergent nation governments. They may also be adapting and restructuring themselves to assume new government functions and responsibilities within the framework of nation government. Thus, community government structures, such as band and tribal councils and associated administrative organizations, could retain their role in the short and medium term following recognition.

Certain strategies and capacities are needed to sustain Aboriginal government operations. Our recommendations address the following:

- human resource capacity generally, particularly in fields not covered in other areas of the report (for example, management and administration, leadership);
- accountability capacities; and
- statistical and data collection capacities.

We also recommend a special program of partnerships between Aboriginal governments and Canadian governments of similar size and scope of operations.

### *Current Aboriginal human resource base*

One of the most significant challenges confronting Aboriginal governments will be to bring together and maintain a trained, professional Aboriginal public service to carry out the many functions of Aboriginal government. As noted in Volume 3, Chapter 5 (especially the section on education for self-government), the pool of trained Aboriginal people has grown steadily over the past two decades, encompassing a wider range of skills and professions. Aboriginal people now operate governments and single- and multi-function organizations and institutions of diverse sizes and degrees of complexity. They deliver myriad programs and services and manage budgets and staff. Notwithstanding dramatic growth in their administrative and service delivery capacity over the last two decades, Aboriginal governments face a shortage of skilled human resources drawn from their own ranks to fill the wide range of jobs that will accompany Aboriginal self-government. (A more detailed analysis of the current Aboriginal human resource



base and its capacity to meet the demands of Aboriginal self-government is reviewed in Volume 3, Chapter 5.)

While it is difficult to estimate the exact requirements of Aboriginal governments, we anticipate that, at a minimum, people with the following experience and skills will be needed:

- negotiators
- program managers and evaluators
- engineers
- traditionalists
- judges and lawyers
- artists
- human resource managers
- communicators
- financial administrators and managers
- healers
- leaders
- social animators
- storytellers
- cultural experts
- elders
- administrators
- economists
- linguists
- accountants
- scientists

This list is not exhaustive; there will be a large demand for specialized technical and related skills in key service sectors, including housing, economic development, health and healing, justice and education. Other parts of our report are concerned more specifically with developing government institutional and human resource capacities in key service delivery areas (see, for example, Volume 3, Chapters 2 to 5).

Data from the 1991 Aboriginal peoples survey and the 1991 census suggest that the range of skills and professional qualifications held by Aboriginal people will need to be broadened to meet the demands of an emergent Aboriginal public service. Although some of the human resource needs of Aboriginal governance can be met from the current pool of skilled people, in many areas the demand for qualified Aboriginal people will outstrip the supply of candidates for some years to come.

Aboriginal governments currently contract with Aboriginal and non-Aboriginal consultants and professionals to provide a variety of services to Aboriginal communities. While Aboriginal governments in the future will not be able to meet all their human resource capacity needs with local expertise, the widespread use of non-Aboriginal professionals and consultants in areas central to the operation of government (such as law, program development and evaluation, accounting and auditing) suggests the need for special measures to meet the demand for more qualified Aboriginal people with these skills.

Human resource capacity has in fact been growing in areas where special initiatives have been established, notably in law, elementary education, social work, management and some areas of community health. In the area of public administration and management, some post-secondary institutions have begun to offer programs and courses geared to the needs of Aboriginal governments.

For example, the University of Victoria's school of public administration offers a part-time university credit program leading to a certificate in the administration of Aboriginal governments. Courses focus on communication, organization and management in Aboriginal government contexts as well as on legal, political, economic and policy dimensions. (Other programs are reviewed in Volume 3, Chapter 5.)

Ensuring that they have the human resource capacity to conduct their public affairs was a concern noted by participants in the community consultation component of the Commission's research studies on Aboriginal government. For example, a study of Siksika Nation governance, observed that

On the basis of the 1986 Census and interviews with senior management in the Siksika administration, it is abundantly clear that there must be a large scale fiscal resourcing of human resources development and training if Siksika self-government is to be successful. Due to high drop-out/push-out rates, the pool of skilled human resources on-reserve is relatively shallow even in some of the most basic occupations such as mechanics, accountants and carpenters. During community consultations, many respondents stated that the Siksika Nation does not have the skilled management and expertise to undertake self-government. It is a genuine community concern which should not be treated lightly.<sup>264</sup>

In another case, a majority of respondents to a community survey felt that the Indian Brook Band, near Shubenacadie, Nova Scotia, had the human resource capacity to run its government, but those interviewed emphasized the need for training, especially in the areas of basic literacy, legal issues, business management, financial administration, and social policy development.<sup>265</sup>

A submission by the Kwakiutl District Council stated that

In almost all cases, the lack of human resources was identified as a major barrier to preparing for negotiations in our community survey on our land and sea question.....Serious negotiation preparation will require significant finances to increase basic human resource capabilities.<sup>266</sup>

The Commission does not believe that the shortage of administrative, management, professional, technical and other skills and expertise should be an impediment to implementing of Aboriginal government. Broadening the human resource base available to Aboriginal governments will, however, require major efforts in training and education. We explore elsewhere in our report the shortcomings of existing education and training opportunities for Aboriginal people and recommend improvements to meet the needs of Aboriginal people and communities and the demands of Aboriginal self-government in the future. Here we consider some specific strategies for human resource development in the field

of Aboriginal government management and administration, particularly as they concern senior managers and Aboriginal leadership.

### *Professionalization*

Professionalization can be a source of significant tension in Aboriginal governments today; it can be both a critical element in effective governance and a major source of division between the Aboriginal people served and the government employees serving them. The tension arises from the need for employees to fulfil their responsibilities in an objective and professional manner, while at the same time retaining the confidence and trust of the community and its individual members. As described in a research study prepared for the Commission by Leslie Brown, 'being professional' often involves adopting certain behaviours, language and values as well as attaining a level of formal education. These requirements may set professional Aboriginal people apart from their fellow community members and introduce mistrust in both professional and personal relationships.

First Nations bureaucrats face a bifurcated reality. They are expected to be 'Aboriginal', to be community members, to be culturally aware and thereby retain close communication and relations with the community. At the same time, they are expected to be 'professional', to behave in a way that is credible to federal, provincial and territorial governments and agencies. The two are not always compatible.<sup>267</sup>

Professionalization also has implications for the systems used to structure and control the work of government organizations. Sophisticated Aboriginal bureaucracies have developed around formalized administrative systems, largely as a consequence of Aboriginal governments having to structure themselves administratively to respond to the demands of external governments. While these forms of administrative organization have their advantages, they can also alienate community members, especially when they reflect values and practices that are foreign and in many cases inappropriate to Aboriginal cultures. In the absence of clear administrative systems and procedures, however, officials may be rendered ineffective as a consequence of uncertainty about their roles and responsibilities. Further, they may act in ways that contribute to administrative inefficiency or leave them unaccountable for their actions. This phenomenon was noted in a case study involving the Indian Brook Band in Nova Scotia.

Staff members, when asked about the study findings, indicated that structure was the key element in correcting the community's outlook on job accessibility and availability. They felt that structure needs to be imposed so that staff will fully understand the band's mandate. They felt that it can be confusing at times for them, when government policies state that they are unable to provide certain services but

they are expected by the community to do so. It places them in a moral dilemma: whether to give services that will not be reimbursed and eventually cause a deficit, or release the funds and hope that it will be overlooked by the auditors.<sup>268</sup>

Another dimension of professionalization stems from the presence and influence of non-Aboriginal consultants and professionals in Aboriginal government environments. In the absence of a broadly skilled human resource base, Aboriginal governments frequently contract with or directly employ non-Aboriginal people to fill certain roles and perform certain functions. While outside professionals may have a certain objectivity as a consequence of disengagement from community social and political structures, they may also, unwittingly, bring their own cultural baggage to their tasks, with a consequent impact on the Aboriginal government, its administrative culture and, in the domain of accountability, its legitimacy in the eyes of the Aboriginal people served.

Commenting on a case study of a Dene community's experience with non-Aboriginal people, Brown observed:

The study revealed how Eurocanadians were constructing subtle, as well as more tangible, barriers to the creation of a post-colonial society during a struggle for decolonization. [The author] felt that the Eurocanadians involved in constructing such barriers, while seemingly concerned with the implementation of self-government, were not yet ready to give up their image as humanitarian benefactors or their positions as persons with power and authority....Sabotaging community processes for gathering input, reinforcing federal and provincial guidelines and authority, and manipulating conflict within the Dene community were among the ways the Eurocanadians involved in the process attempted to prevent effective and autonomous First Nations governance.<sup>269</sup>

We conclude that many of the tensions associated with professionalization will dissipate with increased Aboriginal autonomy and the emergence of Aboriginal-controlled governments and public service. Aboriginal assumption of control over the education and training facilities where Aboriginal people receive their professional qualifications will also have an impact by re-orienting the language, values and objectives of Aboriginal professionals and by adapting professional qualifications and standards to meet Aboriginal needs and priorities.

Tensions may also recede as accountability regimes shift responsibility and reporting relationships toward the people served and away from remote, non-Aboriginal governments. Also, under Aboriginal government, administrative and management practices can be scrutinized more easily by Aboriginal governments and harmonized with the cultural practices and values of the people.



Finally, community education that includes information sharing about the activities and administrative practices of government will help to bridge the gap between Aboriginal people and the personnel of Aboriginal governments.

### *Leadership*

The nature and quality of leadership is an important determinant of effective government. As discussed earlier in the chapter, Aboriginal people have particularly strong traditions in the area of leadership that are a source of pride and inspiration for many. Ensuring that these traditions of leadership are carried into the future and, where these skills have been lost, rediscovered and restored, will be vital to capacity-building strategies.

A useful reminder of the nature of traditional leadership was recorded in a booklet published by the James Bay Cree Cultural Education Centre in Chisasibi. For Cree people, being a man and a good hunter are related.

#### A good hunter

- does not boast about his successes or kills,
- never causes embarrassment to less successful hunters,
- never (or seldom) talks about how he killed an animal,
- conducts himself with dignity and with restraint,
- reveals the information about his catch slowly and quietly, often by non-verbal means,
- shows modesty, does not make an exhibition of himself,
- shares, is generous, and
- even when game is scarce, often manages to catch something.

#### A good leader

- is a good hunter in the first place,
- teaches by example,
- consults others and values their opinions,
- exercises leadership subtly, he is not pushy, and
- obtains consensus among his hunters when making decisions; he seeks agreement.<sup>270</sup>

Forging new leadership styles and improving the practice of leadership should be deliberate and permanent goals of Aboriginal government capacity building. Any distance between the people and their leaders must be bridged, and gulfs that may have formed as a consequence of the imposition of colonial institutions must be narrowed. The challenge will be to restore Aboriginal government leadership traditions and learn new leadership styles that draw on Aboriginal customs, values and traditions in a way that builds on the respect for leadership and knowledge of modern circumstances.

Once again, the current challenge for Aboriginal peoples is to build on the relevant and positive traditions of leadership, to recall these practices, to measure current practices against these norms and to create healthy models for the future.

### Strategies supporting capacity building

We have concluded that, in view of current realities and the many challenges posed in establishing Aboriginal governments as an order of government in Canada, strategies need to be implemented to develop Aboriginal governing capacities. We suggest that such strategies encompass training and human resource development as well as the establishment of formalized systems for Aboriginal government accountability and responsibility. In addition to these strategies, components of which can be implemented at the level of individual Aboriginal governments as well as through Canada-wide measures, we propose changes to the existing system of statistical data collection at the Canada-wide level and information management systems for individual Aboriginal governments. Finally, we recommend a strategy for partnerships or 'twinning' Aboriginal and non-Aboriginal governments to establish forums for information exchange and to enhance understanding among governments in Canada.

#### *Training and human resource development*

Developing human resource capacity may mean the difference between success and failure in implementing and sustaining effective Aboriginal government over time. Immediate as well as long-term needs for administrative and management training and education must be recognized as a priority in the transitional phase toward establishing and operating Aboriginal government.

In Volume 3, Chapter 5, we make specific recommendations for education and training strategies to support the development of human resource capacities for Aboriginal government. (See also Volume 3, Chapter 3 on health and healing, and Volume 2, Chapter 5 on economic development.) These recommendations focus on two strategic points of intervention: increasing institutional capacity and increasing support for students. Our recommendations include the following:

- establishing an education for self-government fund to support partnership initiatives at the post-secondary level;
- introducing student bonuses and incentives to reward completion of programs in fields related to self-government;
- increasing co-operative work placements, internships and executive exchanges for Aboriginal people through partnerships with the private and public sector;
- instituting a Canada-wide campaign to increase youth awareness of opportunities in Aboriginal government;
- involving professional associations in the co-operative development of opportunities for Aboriginal professional training; and
- establishing distance education models for professional training.

Each Aboriginal government will have its own particular human resource needs, determined by the scope of its government operations. These needs will be defined according to short-, medium- and long-term planning and priorities and the progressive emergence of Aboriginal governments. In this regard human resource development transcends and overarches all phases in the transition process.

Human resource strategies should encompass the preparation of inventories and assessment of existing skills available to an Aboriginal government, as well as the identification of human resource needs that can be anticipated throughout transition and implementation. Strategies will also involve establishing personnel policies to attract qualified Aboriginal people and to retain them in the Aboriginal public service. These activities might be undertaken as part of the general planning for Aboriginal government, in constitution-building phases, and in preparation for treaty and self-government negotiations.

## RECOMMENDATION

### The Commission recommends that

Training and  
Human Resource  
Development

#### 2.3.36

Early in the process of planning for self-government agreements, whether in treaties or other agreements, provisions be drafted to

- (a) recognize education and training as a vital component in the transition to Aboriginal government and implement these activities well before self-government takes effect; and
- (b) include provisions for the transfer of resources to support the design, development and implementation of education and training strategies.

We also suggest that human resource development strategies for Aboriginal government be based on the following principles:

- a broad rather than a narrow focus; opportunities should be made available for training and education in a broad range of subject matters, skills areas and professions;
- objectives complementary to self-determination, rather than the administrative objectives of non-Aboriginal governments;
- sufficient flexibility to accommodate the different needs and objectives of Aboriginal governments, whether nation governments, public governments or Aboriginal community of interest governments;

- strategies that are culturally based and relevant to the nation or community served; and
- structures that take advantage of education and training programs offered by Aboriginal-controlled educational institutions, including distance education components, and that place a priority on creating a supportive environment for Aboriginal students.

In addition to our recommendations for human resource development to support self-government contained in chapters dealing with sector-specific matters (for example, education, health, economic development), we make a few additional observations and recommendations on training and education for Aboriginal people working in the administration and management of Aboriginal government, especially those with leadership and senior management and administrative responsibilities.

At present, training opportunities for Aboriginal people in administration and management tend to focus on developing skills for administrative support and middle management. Aboriginal people are being trained to implement the decisions of other governments and decision makers outside the Aboriginal community. We see training for administrative and support positions as a valuable component of Aboriginal government human resource strategies. We draw particular attention, however, to the urgent need to train Aboriginal people to assume senior management and administrative positions in Aboriginal governments. Senior managers will need to be trained in such areas as finance, policy and program design, planning and management. They will also need the capacity to provide objective and sound advice to Aboriginal leaders on these matters and on the law- and policy-making activities of government.

We believe special initiatives should be established immediately to increase the number of persons qualified to assume senior management positions in Aboriginal governments. Opportunities for training and education should be created encompassing innovative education and accreditation techniques, including distance education, on-the-job training, and co-operative and internship arrangements.

Consideration should be given to locating these initiatives in Aboriginal or mainstream post-secondary education institutions. These initiatives and programs should offer opportunities for distance education and accreditation and include periodic updating to support and refresh the skills of senior managers in Aboriginal government.

We conclude that training opportunities of short duration should be made available to Aboriginal leaders through education facilities controlled by Aboriginal people. Leadership training and education initiatives should be concerned with enhancing the interpretive, analytic and decision-making skills of leaders, for example, in the areas of financial and personnel management, in policy formulation and assessment, and in law making. They should be extended



to Aboriginal leaders in a way that ensures minimal disruption in the exercise of leadership responsibilities. Initiatives to enhance leadership skills might be offered through distance education technologies, through periodic short sessions at designated educational institutions, or through on-site workshops in Aboriginal communities on a contract basis with education facilities. In accordance with our observations on the development of leadership capacities that are culturally appropriate, these programs and initiatives should reflect Aboriginal peoples' customs and traditions of leadership and be responsive to the unique demands and expectations placed on individual leaders.

## RECOMMENDATION

### The Commission recommends that

#### Developing Senior Management 2.3.37

To assist Aboriginal nations in developing their governance capacities, the Aboriginal government transition centre promote, co-ordinate and fund, as appropriate, in collaboration with associated education institutions initiatives that

- promote and support excellence in Aboriginal management;
- reflect Aboriginal traditions; and
- enhance management skills in areas central to Aboriginal government activities and responsibilities.

### *Partnerships between Aboriginal and Canadian governments*

In Volume 3, Chapter 5 we recommend, as part of an overall human resource development strategy for self-government, that corporations and governments extend to Aboriginal people opportunities for internships, co-operative work placements and executive exchanges. Among other benefits, these initiatives will contribute to the development of management and administrative expertise and skills, applicable in the private and public sectors, through on-the-job training. In addition we see considerable merit in formalizing a program to facilitate co-operation and greater understanding among Aboriginal and non-Aboriginal governments in Canada, at the same time contributing to the development of the skills and capacities of Aboriginal government employees.

We commend the government of Canada for its initiative to begin such a program in collaboration with the Assembly of Manitoba Chiefs. Under this arrangement a number of Aboriginal administrators are being seconded for

training to federal departments, including central agencies, in Winnipeg and Ottawa.

## RECOMMENDATION

The Commission recommends that

**Twinning 2.3.38**

**Programs** A partnership program be established to twin Aboriginal governments with Canadian governments of similar size and scope of operations.

Under this program, twinned Aboriginal and Canadian governments would share information on management, administration, programs and other government activities, enter into economic and other partnerships, and conduct personnel and executive exchanges. The overall objective of the program would be to establish a climate of mutual understanding and dialogue, and to give partners the opportunity to learn from each other's experience.

### *Establishing accountability systems for Aboriginal government*

As described by many interveners at our public hearings, in briefs presented to us and in our research, Aboriginal people have recognized that establishing mechanisms for government accountability and responsibility must go hand-in-hand with the autonomy that these governments will enjoy under self-government and associated fiscal arrangements. Aboriginal governments must be able to demonstrate to their citizens that they are exercising authority and managing the collective wealth and assets of the nation and administrative structures in a responsible and open manner.

Currently, Aboriginal governments and organizations are accountable mainly to non-Aboriginal governments and agencies, such as the Department of Indian Affairs and Northern Development (DIAND), that provide funding for their activities. There is a widespread perception in some communities that their leaders rule rather than lead their people, and that corruption and nepotism are prevalent. Increasingly, Aboriginal people are challenging their leaders through a variety of means, including legal suits brought against leaders by individual members for alleged breaches of public duty. For First Nations people, this situation is traced to the *Indian Act* system of governance and associated administrative policies. Over the past 100 years the act has effectively displaced,

obscured or forced underground the traditional political structures and associated checks and balances that Aboriginal peoples developed over centuries to suit their societies and circumstances.<sup>271</sup>

At the level of administration, reporting systems and lines of accountability to external agents such as DIAND are time-consuming and complex and divert the energies of Aboriginal service providers away from delivery responsibilities. These arrangements have created a situation where Aboriginal governments are more responsive to external agencies than to community members. Further, the development of the capacity for political accountability has been stymied by the fact that key policy and program decisions are made by non-Aboriginal officials and political leaders.

Dislodging administrative and related practices associated with the *Indian Act* and similar forms of delegated governance will be an important element of healing and capacity building for self-government. The transformation of administrative regimes may be difficult, in part because many of the current practices are familiar and have become ingrained in existing administrations. In many cases, however, First Nations people have already begun to adapt *Indian Act* practices to suit their unique circumstances, needs and preferences.<sup>272</sup>

Interveners before the Commission recognized that systems for accountable and responsible government must be deeply embedded in the fundamental structures of Aboriginal governments and must be consonant with the cultural norms of the people. As stated in one brief:

Accountability must be carefully considered and assessed. Traditionally, there were checks and balances that were functional and appropriate for the Anishinabek. The leaders were servants to the people and upheld the values that were inherent in the community. Accountability was not a goal or aim of the system, rather it was embedded in the very make-up of the system. Traditionally there existed an authentic consensual holistic approach to governing. Consensus as a practical option for decision-making must be re-instated by the Anishinabek.<sup>273</sup>

Checks and balances to promote accountability in government are present in Aboriginal cultures and political traditions. Aboriginal peoples and cultures have a rich tradition and a tremendous variety of practices and customs to draw upon. In general, interveners expressed a desire to see their traditions at the centre of responsible Aboriginal government. Given the significant and new challenges facing contemporary Aboriginal governments, however, Aboriginal peoples may wish to consider the inclusion of formalized accountability mechanisms, including codified standards concerning ethical conduct and conflict of interest.

Developing the internal capacities of their governments for political, financial and administrative accountability should be an element in the constitution-

building activities of Aboriginal nations and in the implementation of their governments. The essence of accountability is the responsibility of government officials and government employees for their conduct while in public office or otherwise in a position of authority. Citizens must be assured that government is conducted by individuals who are beyond reproach and that public administration is carried out by competent public servants.

Accountability falls into three broad categories: for political decisions, for the administration of public affairs, and for the use of public funds. Elected and appointed officials are formally responsible through clearly defined rules and mechanisms. Accountability means that those dealing with or receiving services from governments will be treated impartially, fairly and on the basis of equality; that government decisions will not be influenced by private considerations and will be carried out efficiently and economically; and that public officials will not use public office for private gain. In short, the constituency of people served rather than the office holder should benefit from the discharge of public functions.

Accountability mechanisms normally include reporting requirements regarding how government spends public funds, a code of ethics for public officials, and conflict of interest guidelines and enforcement mechanisms. The goal of such mechanisms, and of accountability regimes generally, is to maintain public confidence in the integrity of government, to uphold high standards in public service and to encourage the best people in the community to present themselves for public office. In this sense, accountability is integrally linked with other elements of governance, including leadership selection and decision-making processes.

Accountability strategies for Aboriginal government may include both informal and formal mechanisms. In terms of formal accountability, a variety of mechanisms could be reflected in Aboriginal constitutions, laws and other public authorities. With respect to accountability for the use and expenditure of public funds, public authorities, including laws and administrative procedures that govern financial management and reporting, can be developed by Aboriginal governments. These may include structures and procedures for the independent review and evaluation of all government activities, including the expenditure and management of public finances.

There is wide experience in Canada with public accountability mechanisms that Aboriginal peoples may wish to draw upon. For example, all jurisdictions in Canada have legislation, policies or guidelines to ensure that the private and personal interests of public officials are not inconsistent with the fulfilment of public duties. These specify the types of behaviours or activities considered unacceptable for a public official: among others, selling or purchasing of a public office, influencing appointments, receiving compensation for services rendered in respect of laws or contracts, disobeying laws, obstructing justice, engaging in businesses or political activity that might conflict with official duties, and failure to disclose information about a public official's financial interests. These laws also specify penal-



ties, ranging from imprisonment, fines and reprimands to suspension or removal of the official from public office.<sup>274</sup>

Tribal governments in the United States enjoy a high degree of internal sovereignty in political affairs. Their experience may also be of interest and relevance to Aboriginal peoples in Canada designing and implementing their own systems for accountable and responsible government. For example, the Navajo Nation has had an *Ethics in Government Act* since 1984, outlining acceptable standards of conduct and restricted activities for public officials and employees, as well as sanctions and penalties. The act requires public officials annually to complete a form disclosing their financial and other interests. Such disclosures, and the overall promotion and supervision of ethical conduct within Navajo Nation government, are the responsibility of the ethics and rules committee of the Navajo tribal council. This body enjoys quasi-judicial powers in monitoring public officials and investigating and conducting hearings on alleged contraventions of Navajo Nation ethics law.<sup>275</sup>

More informal mechanisms of accountability, involving direct interaction among government leaders, officials and citizens, might also be instituted to ensure that Aboriginal governments, particularly nation-level structures, remain connected with the people served.

Informal accountability strategies with a community education orientation could encompass the following:

- regular public meetings and consultation processes on public matters;
- communication through newsletters, radio, television and cable broadcasting;
- regular community surveys and assessments to provide feedback on government activities, priorities, initiatives, and so on;
- establishment of citizen advisory bodies for elders, youth and women, and in key areas of government activity (for example, finance, employee selection and review); and
- opportunities for direct interaction involving individual citizens, leaders and officials, such as citizens' question periods.

---

## RECOMMENDATIONS

The Commission recommends that

### Accountability 2.3.39

Aboriginal governments develop and institute strategies for accountability and responsibility in government to maintain integrity in government and public confidence in Aboriginal government leaders, officials and administrations.

### 2.3.40

Aboriginal governments take the following steps to address accountability:

- (a) Formalize codes of conduct for public officials.
- (b) Establish conflict of interest laws, policies or guidelines.
- (c) Establish independent structures or agencies responsible for upholding and promoting the public interest and the integrity of Aboriginal governments.
- (d) Establish informal accountability mechanisms to ensure widespread and continuing understanding of Aboriginal government goals, priorities, procedures and activities, administrative decision making and reporting systems.

### 2.3.41

To the extent deemed appropriate by the Aboriginal people concerned, strategies for accountability and responsibility in Aboriginal government reflect and build upon Aboriginal peoples' own customs, traditions and values.

## *Data collection and information management*

Improvements and adjustments will need to be made to Canada-wide statistical and data-gathering systems to respond to and support emerging and new forms of Aboriginal government. Ultimately, improvements in the structure and activities of Statistics Canada, as they relate to Aboriginal people, and the census, post-census and other surveys on Aboriginal people will be beneficial to Aboriginal government planning activities as well as to the determination of fiscal transfers to Aboriginal governments.

For Aboriginal people, knowing how political, demographic, social and economic changes will affect their nations and having in place data collection vehicles that provide a community and nation level aggregate picture will be essential to Aboriginal government implementation and planning processes. Having a reliable, valid and continuous statistical system, however, will require the participation of all Aboriginal people and nations if the system is to have the utility and credibility that users need.

Because of the evolving nature of Aboriginal societies, their government structures, economies and social conditions, we believe that it is essential to have a flexible survey vehicle or instrument to measure changing conditions over time. A post-census survey provides the opportunity to reach a large sample of the Aboriginal population, especially those living off-reserve in rural and urban areas, and enables the type of in-depth analysis required for policy development and for planning and

evaluation of programs and services affecting Aboriginal people – activities that increasingly will be the responsibility of Aboriginal governments in the future. Statistics Canada might wish to consult with national Aboriginal organizations on the range of off-reserve communities to be included in a post-census survey.

With respect to the content of survey instruments, there is evidence that Aboriginal people are increasingly describing themselves according to their nation or tribal affiliation, instead of accepting the terms supplied in the survey instrument. Although there has always been the opportunity for respondents to write in an ethnic group not covered in the list of responses, an Aboriginal person would have to write in his or her tribal or nation affiliation in the 'other ethnic group' space, which is usually at the end of the ethnic group list. This may discourage Aboriginal people from responding to the ethnic/cultural question, since they are not an 'ethnic group'. Other problems are posed for the selection of sample populations for the post-census survey.

It has come to our attention that changes may be required in the geographic coding system used by Statistics Canada in census and other survey instruments to account for the establishment of new jurisdictions in which Aboriginal governments operate, or areas in which these may emerge in public or other government form. These areas include the Metis Settlements of Alberta, mid-north communities with significant Aboriginal populations, and Nunavut. The changes we recommend may assist Aboriginal people and local groups in acquiring data from Statistics Canada more easily and at reduced cost.

---

## RECOMMENDATION

### The Commission recommends that

#### Statistical Data 2.3.42

##### Collection

Statistics Canada take the following steps to improve its data collection:

- (a) continue its efforts to consult Aboriginal governments and organizations to improve understanding of their data requirements;
- (b) establish an external Aboriginal advisory committee, with adequate representation from national Aboriginal organizations and other relevant Aboriginal experts, to discuss
  - Aboriginal statistical data requirements; and
  - the design and implementation of surveys to gather data on Aboriginal people;
- (c) continue the post-census survey on Aboriginal people and ensure that it becomes a regular data-collection vehicle maintained by Statistics Canada;

- (d) include appropriate questions in all future censuses to enable a post-census survey of Aboriginal people to be conducted;
- (e) in view of the large numbers of Aboriginal people living in non-reserve urban and rural areas, extend sampling sizes off-reserve to permit the statistical profiling of a larger number of communities than was possible in 1991;
- (f) test questions that are acceptable to Aboriginal people and are more appropriate to obtaining information relevant to the needs of emerging forms of Aboriginal government;
- (g) test a representative sample of Aboriginal people in post-census surveys;
- (h) include the Metis Settlements of Alberta in standard geographic coding and give each community the status of a census subdivision;
- (i) review other communities in the mid-north, which are not Indian reserves or Crown land settlements, to see whether they should have a special area flag on the census database; and
- (j) consider applying a specific nation identifier to Indian reserves and settlements on the geographic files to allow data for these communities to be aggregated by nation affiliation as well as allowing individuals to identify with their nation affiliation.

We commend the federal government on its efforts to involve Aboriginal people in conducting the 1991 census and post-census Aboriginal peoples survey. Statistics Canada broke new ground in terms of its extensive consultation efforts with Aboriginal groups. It established a number of agreements with First Nations organizations in several provinces, resulting in Aboriginal people assuming a meaningful role in conducting and supervising data-collection operations. In those regions where such agreements were in place the data collection phase proceeded smoothly.

## RECOMMENDATION

The Commission recommends that

### Future Censuses 2.3.43

The federal government take the following action with respect to future censuses:



- (a) continue its policy of establishing bilateral agreements with representative Aboriginal governments and their communities, as appropriate, for future census and post-census survey operations;
- (b) in light of the issues raised in this report and the need for detailed and accurate information on Aboriginal peoples, the decision not to engage in a post-census survey, in conjunction with the 1996 census, be reversed; and
- (c) make special efforts to establish such agreements in those regions of Canada where participation was low in the 1991 census.

The capacity of Aboriginal government to design, plan and manage a broad range of government functions and operations in the future will be improved if Aboriginal people have adequate information management skills and access to appropriate technologies within their own government organizations. Information management systems currently in place in Aboriginal communities may be sufficient for administering limited local government responsibilities, small service delivery institutions, societies and non-profit associations. However, as Aboriginal governments assume significantly increased authority and responsibility in areas such as citizenship, financial planning and management, and new services sectors, the demand for data management systems and related capacities will increase.

Aboriginal governments must have at their disposal the human resource skills, technologies and equipment to assist them in meeting the challenges of managing information in an Aboriginal government with confidence. Information management systems in support of self-government should allow for controlled access to confidential information, collection and analysis of information within and across communities in a nation, pooling of information among multiple Aboriginal nations, and maximum compatibility with Canada-wide statistics gathered by Statistics Canada. A recommendation for an Aboriginal statistics clearing house to serve these ends appears in Volume 3, Chapter 5.

## RECOMMENDATION

The Commission recommends that

Information Systems for Aboriginal Governments	2.3.44
	Governments provide for the implementation of information management systems in support of self-government, which include

- (a) financial support of technologies and equipment proportional to the scope of an Aboriginal government's operations; and
- (b) training and skills development, including apprenticeships and executive exchanges with Statistics Canada, to facilitate compatibility between Aboriginal government systems and Statistics Canada.

## 4.3 The Structure of the Government of Canada for the Conduct of Aboriginal Affairs

Implementation of our recommendations will require changes in the organization of the government of Canada for the conduct of its responsibilities related to Aboriginal affairs. Without seeking to predetermine choices about implementation that will best be made by the political leaders and officials directly involved, it is part of our responsibility to consider the changes needed in the structure of the government of Canada as a result of our recommendations. We propose what we believe to be the best organization for the development and implementation of Aboriginal policy through the cabinet system. By implication, we consider the future of the Department of Indian Affairs and Northern Development.

An essential condition for change is the establishment of effective agencies through which the federal government can fulfil the commitments called for in our recommendations. If the last several decades have revealed anything about federal administration in Aboriginal affairs, it is that no real change will occur without agencies structured in such a way as to facilitate change, staffed by committed people who can work unencumbered by conflicting policy instructions.

We have already established that there are deep structural reasons for failures in federal management of Aboriginal affairs. We addressed these at length in Volume 1, and our recommendations relating to restructuring the relationship and improving the social and economic circumstances of Aboriginal peoples reflect our assessment of how to remedy the failure. The specific institutional changes discussed here are necessary companions to our other recommendations.

We begin our analysis with a review of the history of federal organization for the conduct of Aboriginal affairs. An understanding of this history is important because, despite many reorganizations and changes in philosophical direction, other characteristics of the federal approach to managing Aboriginal affairs have proven resistant to change over many decades. Some of these more intransigent characteristics have prompted what are now conventional critiques of DIAND and, more generally, the federal government's performance.

Our proposals and recommendations are not based solely on the lessons of history, however. There are a number of contemporary challenges associated with reform of the status quo. To a considerable extent, these are shaped by the current social and economic environment and by the realities of organizational life within the government of Canada. We also develop our recommendations on the basis of important principles for federal institutions, such as the goal of transparency – public policies that are readily understood by Aboriginal people and other segments of the attentive public, as well as within the government of Canada. In summary, the approach we recommend to reshape the federal government takes into account the lessons learned from the past and the current environment, as well as the Commission's recommended direction for Aboriginal policy.

### Lessons from history

The current state of federal organization for the development and implementation of Aboriginal policy reflects historical conflicts and strains in political and bureaucratic philosophy about Aboriginal issues. It also reflects the fact that federal policy making has rarely taken a comprehensive approach to Aboriginal affairs. Instead, the various departments with responsibilities for matters of interest to Aboriginal peoples have developed policies and programs independently of each other, and frequently only for specific groups of Aboriginal people.<sup>276</sup>

Historically and today, the federal approach reveals an interplay among ideas of federal custodianship, an emphasis on infrastructure development born of a desire both to improve the objective conditions of Aboriginal people and to permit the opening of lands and other developments in their traditional territories; and an emphasis on micro-scale and 'holistic' community development. More recently, we see an emphasis on political and administrative devolution. This emerged first as an aspect of northern development policy, beginning in the late 1960s; but it also underlies the various federal self-government initiatives of recent years. Unfortunately, the different organizing principles and philosophies for the conduct of Aboriginal affairs have often competed with one another, both within DIAND and in the federal government as a whole.

Reviews of DIAND and its predecessors reveal almost constant organizational and policy flux. Until recently, critiques by Aboriginal people and others have, however, been remarkably consistent.<sup>277</sup> The conventional criticisms are as follows.

*DIAND operates under a legacy of colonialism and paternalism and is resistant to change.*

As the department charged with implementing the *Indian Act*, DIAND could hardly have escaped this criticism. For at least 30 years, successive ministers of Indian affairs have announced their intention to change the department's orientation and to create a new role for the department in promoting and enabling the economic and political development of Aboriginal communities. Whatever

successes there have been in this area have come more slowly than predicted and with less than wholehearted support from the department.<sup>278</sup>

✓ *DIAND's performance in the federal policy arena is inadequate.*

Departments with more focused functional responsibilities and budgets are seen as being able to 'walk over' DIAND, at least in its policy role. Critical departments include defence, health, natural resources (and its various predecessors) and fisheries. In addition, over the years DIAND has been seen as having insufficient capacity to bring its own policy initiatives to fruition through the cabinet decision process.

The relative weakness of DIAND may seem odd, considering its large budget and the minister's ability to lever supplementary funds from the expenditure budget.<sup>279</sup> It is likely a result of the contradictory mandate, which has made the department prone to protracted internal policy debates and has made it difficult for the department to benefit from the efforts of its politically active and effective constituency.<sup>280</sup> That constituency is extremely diverse, including at various times resource developers, status Indians, Inuit, and northern political leaders with aspirations to provincehood, among others. At different times virtually all members of this constituency have tried to circumvent DIAND to make claims more directly on other ministers or on cabinet.

✓ *DIAND is evasive or negligent on the matter of meeting federal treaty and claims obligations.*

Federal policy on Aboriginal rights and title, as well as that with respect to treaties and comprehensive claims, has been extremely inconsistent over time.<sup>281</sup> And if policy directions have vacillated dramatically, it is plain that federal *behaviour* has been relatively consistent: the federal role has been to deny the original spirit and intent of the treaties and to attempt to restrain any expansion of federal responsibilities to all Aboriginal peoples in Canada. The absence of any effective oversight mechanism, aside from the courts, has been a matter of concern.<sup>282</sup>

## The organizational challenge

Linking these perceptions and lessons from history with current reality, the Commission faced three important challenges in developing a vision of federal executive organization for Aboriginal affairs:

- Policy capacity: How can organizational capacity within the federal government be enhanced to ensure that it will be possible to develop policy to implement a restructured relationship?
- Implementation: What institutional arrangements will make it most likely that major reforms will be implemented once policy has been developed?
- Current trends in government organization: How can these wide-ranging proposals for structural and program reform be explained and defended in the real world of government in the 1990s?



### *Policy capacity*

Our recommendations related to the policy capacity of the federal government suggest a number of imperatives.

First, there is a need to identify the policy initiatives that will start the process of implementing the new relationship, in contrast to those that will sustain it.

Several of the Commission's major recommendations are in the first category – measures that will launch the process of developing a new relationship between Aboriginal peoples and other Canadians. These include, for example, the proposal for a royal proclamation to establish an appropriate context for negotiations; the Aboriginal Nations Recognition and Government Act; the decision to establish and support treaty commissions; and, for the prime minister, the decision to reorganize the government to reflect the new relationship and agenda for change, as recommended by the Commission.

For such initiatives, the leadership of the prime minister and the support of the government – as well as the sustained effort of the prime minister's office and the Privy Council Office – will be required.

Second, recommendations must deal with the establishment of a federal policy capacity related to the full range of its responsibilities for Aboriginal peoples.

The Commission has recommendations covering many functions, such as health, education and economic development. The DIAND experience indicates that a multi-functional unit faces major obstacles to effectiveness across the full range of responsibilities. When many functions must be served by a single department, it is difficult to develop sufficient depth of expertise in all areas. Compounding this problem is the capacity of departments and agencies of government that carry the lead responsibility for a particular function (for example, human resources development or natural resources) to dominate policy debates within government related to Aboriginal-focused initiatives or to influence the situation of Aboriginal people, through their action or inaction.

Third, both the reputation and the reality of past federal practice suggests the need for recommendation(s) for policy oversight and guidance other than through the courts.

### *Implementation issues*

Regardless of the substance of future federal policy, there are fundamental organizational issues related to policy and program implementation.

What will the operational relationship be between Aboriginal governments and the federal government?

This question may be particularly critical during the transition to self-government. The federal government will still have responsibility for assisting

Aboriginal governments to build suitable capacity to manage their affairs. Over the longer term, relations will continue, at the administrative level, between Aboriginal governments and the federal government on matters such as policy and program co-ordination and funding. ✓

It is likely that both symbolic and practical considerations will induce Aboriginal governments to seek a federal/Aboriginal government relationship that will be in some respects analogous to that of federal and provincial governments. This implies diffuse access to the various departments and agencies of the federal government.<sup>283</sup> ✓

For treaty nations and those with comprehensive claims, can organizational improvements be made that will result in the more timely and effective implementation of federal obligations?

Is an organization like DIAND the best means for fulfilling federal fiduciary and operational obligations related to the *Indian Act*? This question becomes particularly important when we recognize that some Aboriginal communities may not want to depart from the act in the near future.

### *Current trends in government organization*

The question of how best to organize for effective Aboriginal policy development and implementation should be addressed in light of recent experience and the current direction of reform in the machinery of government.

Two previous experiments with federal cabinet reorganization are worth noting, both of which were ultimately abandoned. The first was the creation of a new ministry of state, a potentially tempting device for reorganizing federal policy responsibilities in Aboriginal affairs.<sup>284</sup> A ministry of state unencumbered by operational responsibilities may seem an appropriate instrument to usher in a new era in which Aboriginal governments themselves control much of the public expenditure in their own territories. Assessments of such ministries, such as the former ministry of state for urban affairs and the ministry of state for science and technology, suggest, however, that they have had very little claim on the attention of departments with operating responsibilities and significant budgets, or on cabinet.<sup>285</sup> Some means of increasing a policy ministry's clout under these circumstances would seem advisable. ✓

A second institutional approach to policy development emphasized cabinet committees and the clustering of ministries into envelopes or other groupings. This instrument, used on its own, is not promising. Bruce Doern's work suggests that the envelope system of the 1970s failed to capture the breadth of the Aboriginal policy field, instead channelling all Aboriginal policy into the social policy area.<sup>286</sup> ✓

Establishing an Indian affairs department devoted to policy concerns and reforming the expenditure process play a role in our recommendations, but neither step is adequate on its own.

In considering institutional options, we have also taken into account more recent trends in federal government organization, sparked to a considerable degree by the imperatives of expenditure reduction, in particular,

- The creation of large, multifunctional departments, such as human resources development, public works and government services, and Canadian heritage. These very large departments were intended to enhance policy and program co-ordination within the federal government by creating departments with interconnected responsibilities, as well as to facilitate the process of reducing the number of employees in the federal public service by combining similar functions and responsibilities.
- A preoccupation with creating partnerships between the federal government and other governments, non-governmental organizations and the private sector. Partnerships are often seen to facilitate program delivery and to provide a means for renewing the federal policy capacity. In popular terms, the federal government would prefer to emphasize steering, not rowing.<sup>287</sup>
- Retention of some of the 'businesslike' functions of government but housing them in more independent special operating agencies.
- An overwhelming preoccupation with reducing the apparent overall size of the federal government.

In making our recommendations, we have not followed any one or all of these trends blindly. It is our best judgement, however, that our proposals for institutional reform tread a reasonable if assertive middle path: they make sense in the existing climate without necessarily following the loudest drummer. Most important, they provide a sound organizational basis for moving ahead to implement the new relationship and sustain federal momentum for developing the many policy and program initiatives we recommend.

Finally, there are two important realities about the way government bureaucracies operate that form the permanent backdrop for any of the Commission's institutional recommendations:

- Existing central agencies have persistent and strong interests in Aboriginal policy. The departments of finance, justice and treasury board are particularly important, as is the Privy Council Office.
- The Commission hopes to stimulate a lasting impetus for change, but must recognize that this impetus will be met by significant natural 'drags' that will slow or curtail implementation of the key recommendations.

Such countervailing forces include the absence of institutional capacity to do everything at once or to do some things at all; preoccupation by the government with other policy agendas; and conflicts among the different institutional arms of the federal government about what should be given priority. The last two factors indicate a need for a strong and focused capacity to develop policy on Aboriginal affairs, as well as clearly assigned responsibility for co-ordinating the

different parts of the federal government that may be charged with implementing the new relationship.

All of the considerations just reviewed argue for a careful and fundamental reconsideration of the federal institutions through which the new relationship could be realized. The organizational complexities, as well as the volatility of Aboriginal affairs and the many costly episodes of confrontation and stalemate, suggest that developing new institutions appropriate to bringing about fundamental change is not a simple matter. When thinking about the various possibilities for reform, we were guided by a number of principles that speak to the public interest and to organizational needs.

### Proposed principles

The following principles underlie our recommendations concerning federal government organization. These are not intended as evaluation criteria; the fact that some of them are seemingly contradictory would bedevil an effort to use them in this way. They are complementary to the preceding analysis, to serve as *inuksuit*, to assist in navigation.

- **Simplicity:** Organizational changes should be as straightforward as possible; all other things being equal, where there is a choice of format or mechanism, preference should be given to the simpler form.
- **Transparency:** The reasons for and content of recommendations must be capable of being readily understood within the government of Canada, by Aboriginal peoples and by other segments of the attentive Canadian public.
- **Link between policy development and implementation:** Experience suggests that initiatives in which the ultimate doers create the policy and in which the idea people share responsibility for implementation are most likely to be successful. This principle implies rejection of ministry of state approaches, as they have been conceived in the past, but requires consideration of how to enhance policy development and implementation.
- **Oversight:** The general perception of unmet federal commitments requires specific attention to oversight other than through the courts.
- **Respect for difference:** Policies and institutional arrangements must reflect fundamental differences among Aboriginal peoples. This may imply differentiation within a single federal organization or policy regime, or different organizations or regimes.

### Implications for the federal role

Our recommendations fall into three broad categories.

First are recommendations fundamental to restructuring the relationship between the government of Canada and Aboriginal peoples. Two examples of this type are the recommendation to form the foundation of the new relation-



ship through a royal proclamation and companion legislation; and the development of new institutions through which better policies will be developed and sustained, as in the restructuring of the federal government and the establishment of the treaty commissions and the Aboriginal Lands and Treaties Tribunal.

These initiatives will be necessary to launch the process of building the new relationship. They will require prime ministerial leadership, the full commitment of the cabinet, and sustained and ingenious support from the key central agencies of the cabinet, the Privy Council Office and the prime minister's office.

Second, several key recommendations will require federal executive attention over a longer period. These recommendations are essential to complete implementation of the new relationship but are not symbolically or legally essential to the launching of a new relationship. They imply the need for a federal capacity for

- sectoral policy reviews, in such areas as education, health and healing, and housing; and
- reviews of the federal fiscal framework as it relates to fiscal arrangements between Canada and Aboriginal governments and funding levels for continuing federal programs and new institutions and arrangements.<sup>288</sup>

Finally, there is an important third category of recommendations that support or improve measures already mandated by legislation (most often, the *Indian Act*). These activities are

- implementation – the conclusion of new comprehensive claims and self-government arrangements under the approaches recommended by the Commission, together with the requirement that the federal government live up to the terms of existing agreements and initiatives (recent examples of which are the agreement to establish Nunavut and the Nunavut land claim agreement, as well as the Manitoba initiative and the 1995 federal policy guide on Aboriginal self-government), suggests a need for enhanced capacity within the federal government to implement such agreements; and
- reformed servicing – for communities that decide that, for the immediate future, they want to retain a relationship with the federal government under the *Indian Act* and established administrative practices for governance and community servicing. The Commission's recommendations on remedial reform, perhaps most particularly in Volume 3, point to improvements in federal practice that should be made, even in the *Indian Act* context.

These activities suggest that the federal government needs the following institutional capabilities:

- a capability to negotiate new treaty arrangements, self-government accords and claims agreements;
- a capacity to develop and review policy;

- a capacity to service and deliver programs to communities operating under the terms of the *Indian Act*;
- a capacity to facilitate and implement new policies and relationships. This implies specialized expertise, in areas such as education, health, and economic development, to implement policy and program changes resulting from federal policy reviews and new agreements with Aboriginal peoples and their governments. It also includes the capacity to get funds and other forms of support out to Aboriginal governments, Aboriginal agencies and organizations established jointly by Canada and Aboriginal peoples (and perhaps provinces), consistent with any federal commitments for such support;
- a capacity to develop and establish alternative dispute resolution mechanisms, such as the lands and treaties tribunal; and
- a centralized executive oversight capability, within the cabinet structure, to ensure that the practices of departments and agencies throughout the federal government conform to federal policy.

## The proposed organizational structure

Lessons from the past, the current context and the challenges posed by the Commission's recommendations require a federal government with the capacity to develop and implement the new relationship while continuing to meet federal obligations. The federal organizational structure must also have the capacity to conduct intergovernmental relations with provincial and territorial governments, encouraging co-ordinated and constructive initiatives at all levels of government. The federal government's organization must have these capabilities while avoiding some of the institutional conflicts of interest and other difficulties associated with past arrangements.

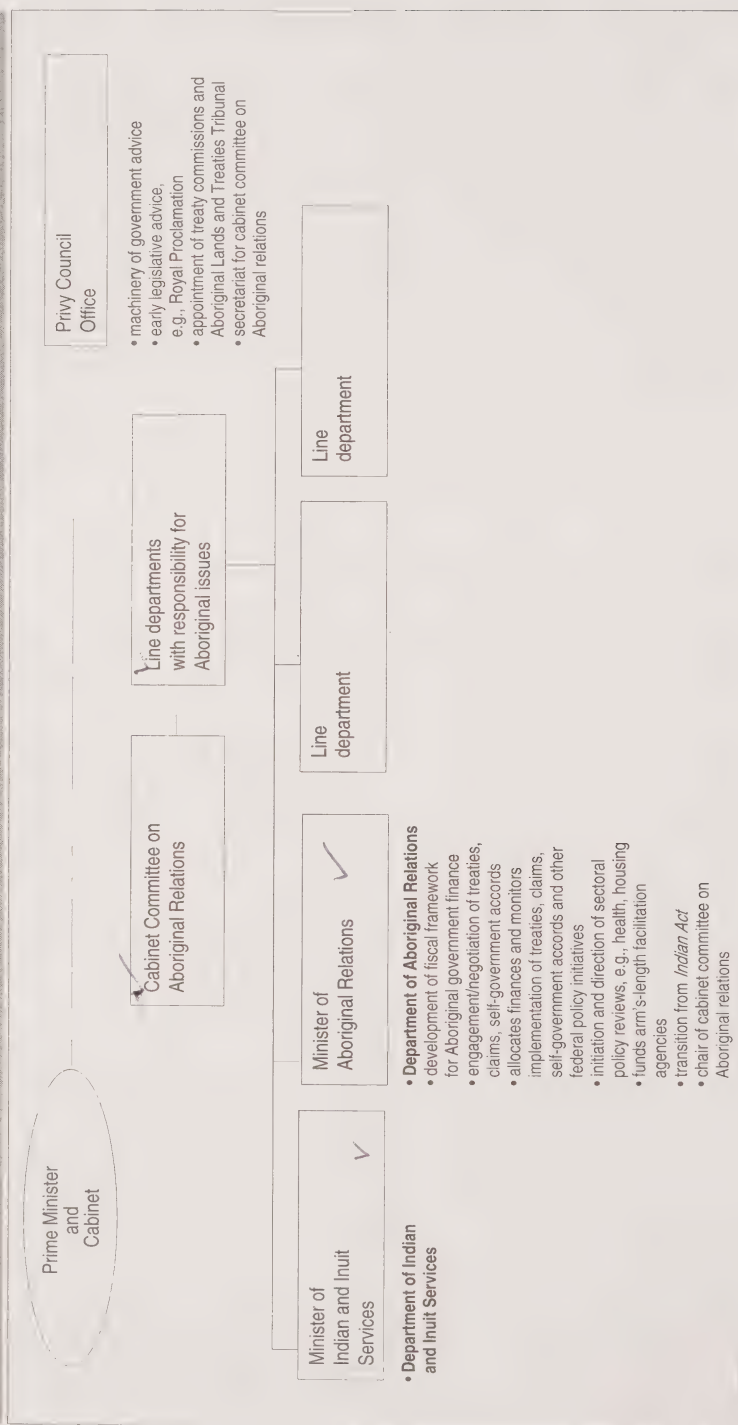
The key elements of this new approach are reflected in our recommendations on

- the leadership initiative of the prime minister;
- the overall structure of the federal cabinet;
- the role of the Privy Council Office;
- the establishment of a new department of Aboriginal relations, under a minister of Aboriginal relations; and
- the establishment of a new Indian and Inuit services department to meet continuing federal obligations to Indian communities and Inuit, until transition to self-government.

### *The cabinet structure*

The proposed cabinet structure reflects the important lessons from past government organizations, the different requirements for centralized and more decentralized executive action, and the realities of the operational milieu for

FIGURE 3.2  
Proposed Organization of the Government of Canada as it Relates to Aboriginal Peoples



implementing the Commission's recommendations. Figure 3.2 indicates five central elements of our proposed approach.

*1. Responsibility for beginning and sustaining renewal in the conduct of Aboriginal affairs lies with the prime minister.*

The prime minister would, as a matter of course, carry out this role in consultation with cabinet and supported by the branch of the Privy Council Office (PCO) that deals with machinery of government. This latter group will have responsibility for guiding the federal role in relation to any independent tribunals and bipartite or tripartite organizations that might be established. For example, appointments to the Aboriginal Lands and Treaties Tribunal would be made through the PCO by cabinet.

More generally, as discussed later, PCO will support the prime minister and cabinet as a new cabinet committee on Aboriginal relations conducts its work.

The pivotal role of the prime minister is not restricted to initiating institutional reform or launching federal support for independent tribunals and bipartite and tripartite organizations. At the most fundamental level, it falls to the prime minister to launch and nurture the renewed Aboriginal/Crown relationship, through a vehicle such as a royal proclamation and its companion legislation. We discussed our recommendation for a royal proclamation in Chapter 2 of this volume.

*2. A new senior ministerial portfolio, the minister of Aboriginal relations, and a new department of Aboriginal relations are established.* ✓

Created to guide all federal actions associated with developing and implementing the new federal/Aboriginal relationship, this new department would combine policy and intergovernmental responsibilities with responsibility for the overall fiscal framework and federal spending related to Aboriginal affairs. We have tried to build on the experience of the federal government with other attempts at institutional change. Specifically, we have concluded that there is a need for a minister with real power to oversee policy development throughout the federal government, to lead the federal intergovernmental relationship with Aboriginal governments and with provinces and territories on Aboriginal affairs, and to make sure that federal policies and other commitments reflecting the new relationship between Canada and Aboriginal peoples are implemented by federal departments and agencies.

Previous efforts have failed, both in the conduct of Aboriginal affairs and in federal efforts to co-ordinate initiatives related to such diverse fields as urban affairs and science and technology policy. In the latter instance, ministries of state lacked the real policy levers, most importantly the financial levers, to do their job. From the mid-1970s until its abandonment in 1984, the envelope system attempted to link policy development and spending decisions across policy



fields. It failed, however, to provide adequate emphasis on Aboriginal matters or to reflect the breadth of Aboriginal issues. Aboriginal issues were collapsed under the rubric of social policy, both at the department level (through the ministry of state for social development) and in its mirror cabinet committee on social development. We also reviewed the history of the administration of the *Indian Act* and concluded that DIAND does not provide the appropriate structure or environment for the task ahead.

Conventional criticisms of DIAND support this conclusion.<sup>289</sup> One may take issue with these criticisms. The fact remains, however, that the perceptions are widely shared, and the criticisms are supported by the Commission's own research. We believe the legacy of DIAND's corporate history since its establishment has contributed to two somewhat contradictory tendencies: internal resistance to change and a reluctance to 'expose' the department as it relates to obligations under historical treaties or more contemporary claims agreements and, in the most recent period, a tendency to move relatively quickly on policy initiatives without adequate consultation with those affected, raising questions about whether adequate attention has been paid to their implications. We do not think either tendency will contribute to the development of a sound foundation within the government of Canada for the new relationship we envision.

The practical effect of the proposed innovation would be that the new minister would oversee Aboriginal policy and program development across the departments and agencies of the federal government. The minister would have the authority to ensure that new initiatives and continuing activities reflect the spirit and intent of the new relationship. To a significant degree, this would occur by virtue of the minister's authority to allocate funds from the federal government's expenditures on Aboriginal issues and operations across the government. The minister would also have the authority, by virtue of a monitoring role, to withdraw or withhold funds should federal commitments be unmet by other federal departments and agencies or by initiatives contrary to the spirit and intent of the new relationship being proposed.

It is important to note that the minister of Aboriginal relations would carry out fiscal responsibilities within the overall federal fiscal framework established by the minister of finance. We expect, however, that the minister of Aboriginal relations would engage with the minister of finance in vigorous negotiations about the overall fiscal framework. As Figure 3.2 indicates, within the context of the fiscal framework of the federal budget, the minister of Aboriginal relations would have the lead responsibility for managing the fiscal envelope related to Aboriginal affairs. This includes negotiating and concluding financial arrangements associated with comprehensive and specific claims, treaties and self-government accords; developing the foundational federal/Aboriginal relationship related to Aboriginal government finance; allocating funding to other federal departments with line responsibility for meeting federal obligations and imple-

menting initiatives; and funding the various arm's-length agencies the Commission recommends to facilitate the new relationship.

One of the principal responsibilities of the minister would be the conduct of the recognition and self-government process under the Aboriginal Nations Recognition and Government Act and the negotiation of renewed and new treaties with Aboriginal nations, to be undertaken through the Crown treaty office in the department of Aboriginal relations. Of equal importance will be a capacity to monitor the Crown's implementation of its treaty and other undertakings as well as its fiduciary obligations to Aboriginal nations. This responsibility should be discharged by a Crown implementation office within the department.

This new senior minister would not have direct responsibility for service delivery. Our next two recommendations address the principles and practicalities related to service delivery and implementation of new federal commitments.

*3. Responsibility for direct implementation of new federal initiatives relating to Aboriginal people should be assigned to the relevant line departments and agencies of the federal government.* ✓

In every instance, the work of the line departments would be subject to monitoring by the minister for Aboriginal relations. As appropriate, line departments and agencies would also be involved in functional policy reviews (with respect to housing or economic development, for example) as recommended by the Commission. This is consistent with the government's current effort to enhance the co-ordination of initiatives by establishing ministries that work across broad policy fields. It is also consistent with the characteristics of a real government-to-government relationship between Aboriginal governments and the federal government. As already indicated, the minister of Aboriginal relations would have the lead role in co-ordinating policy reviews, overseeing implementation through its funding responsibilities, and broadly monitoring implementation. This arrangement speaks to our principle of linking policy development to implementation.

*4. Another minister, the minister for Indian and Inuit services, would head a new Indian and Inuit services department and be responsible for delivery of the government's remaining obligations to status Indians, Inuit and reserve communities under the Indian Act.* ✓

In keeping with the increasing self-reliance of all Aboriginal peoples and communities, we see the role of this minister and department as secondary to that of the minister of Aboriginal relations. There are two important manifestations of this. First, the minister for Indian and Inuit services would probably combine this responsibility with another portfolio. Second, the principle that the minis-

ter of Aboriginal relations controls the purse strings for federal activities related to Aboriginal peoples and is responsible for monitoring would apply to the relationship with the minister of Indian and Inuit services, in the same manner as with other ministers overseeing departments with line responsibilities for particular Aboriginal issues.

The Department of Indian and Inuit Services would have no policy role in the transition to self-government. Its establishment is intended to reflect the fact that many First Nations and Inuit communities will choose to live under existing legislation while reconstructing their nations.<sup>290</sup> In some cases, the federal government, through this department, will be involved with such communities in overseeing the construction of housing and other forms of infrastructure. For Inuit, who are rapidly developing public government institutions that will eventually be capable of assuming all governmental responsibilities, there may still be some federal obligation – such as in the area of post-secondary education – that would be administered by the Indian and Inuit services department, at least in the interim. For Métis people, federal initiatives of an interim nature, such as the administration of scholarship funds, would also, prior to the negotiation of a full treaty relationship, be administered by this department.

The needs of nations, bands and communities for effective support and service delivery should not be overshadowed by the important initiatives we foresee in terms of fundamental policy. Although the Inuit and Indian services department would have no policy role, it would be expected to develop and implement the best practices possible for the support of Indian peoples and Inuit and of communities using its services. It should not just be a bastion of the past.

Establishing this department alongside the department of Aboriginal relations is intended to differentiate the context in which the remnants of the old relationship are administered from the fundamentally new relationship associated with the Commission's recommendations. As peoples and communities move to embrace the new relationship, their connection with this department will wither away, to the point where it will be redundant.

*5. There should be a permanent cabinet committee on Aboriginal relations, chaired by the minister of Aboriginal relations.* ✓

We have already emphasized the central role of cabinet in supporting the prime minister's role in renewing the fundamentals of the relationship between Canada and Aboriginal peoples. We believe there are two continuing aspects of the collective responsibility of cabinet that suggest the need for a permanent cabinet committee dedicated specifically to Aboriginal relations.

First, cabinet will have to approve many new policy initiatives. These are of several types, including new mandates for the renewal and negotiation of treaties, claims and self-government accords; policy recommendations regarding transition from the *Indian Act*; and policy recommendations resulting from the



various sectoral reviews we have recommended. The importance and volume of this work suggests the need for a cabinet committee to provide knowledgeable guidance to the full cabinet.

Second, cabinet colleagues will have to support the minister of Aboriginal relations as he or she initiates the various reviews and reforms that require inter-departmental/agency co-ordination. There will be a natural tendency for competing agendas to erode the momentum of Aboriginal policy development. Establishment of a focal point for collective responsibility and leadership within cabinet should help sustain co-operation, while it will also signal this purpose to federal officials, Aboriginal peoples and the attentive public.

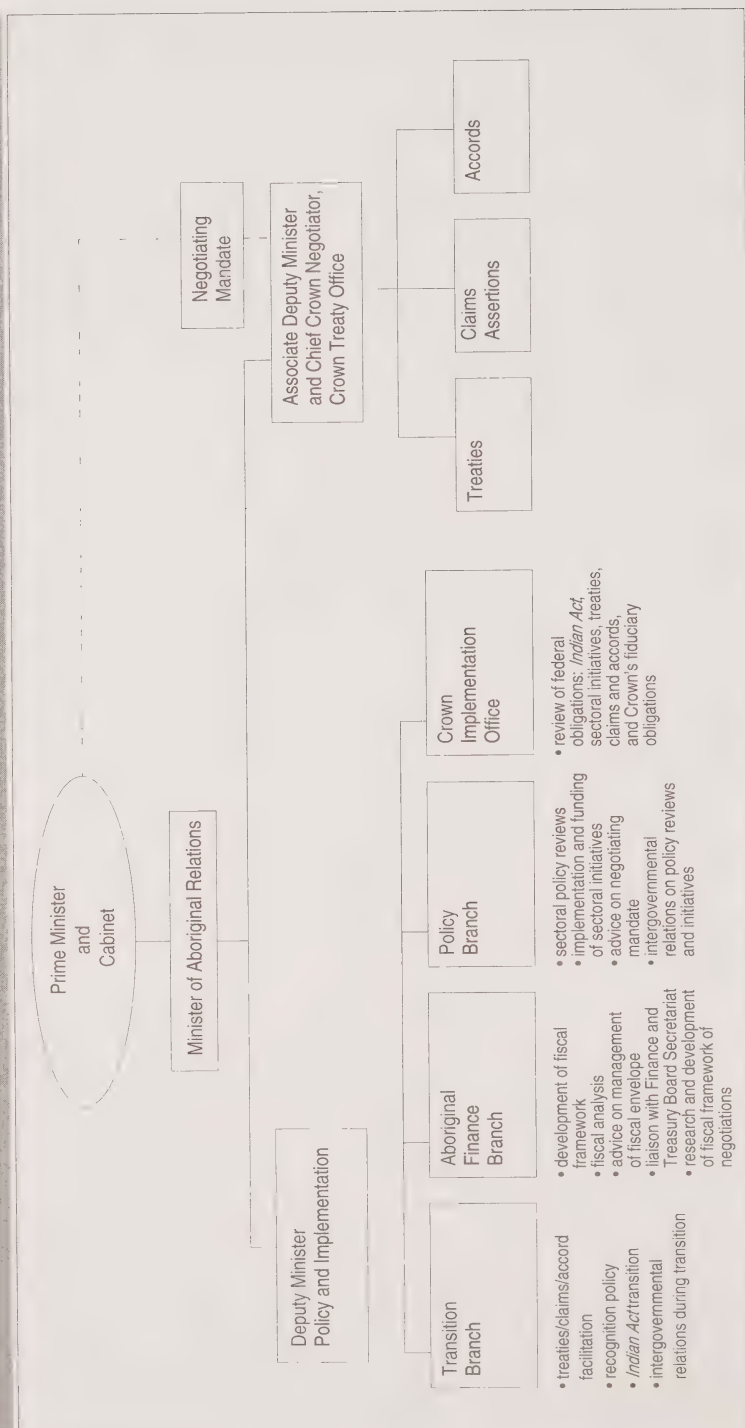
Membership on the committee should reflect the fact that the federal/Aboriginal relationship is diverse and that this committee is not simply dealing with a particular aspect of social policy. We have seen the pitfalls of this latter approach in our review of the past.

It is important that the minister of Aboriginal relations chair the committee. There are a number of reasons for this. First, holding the chair will reinforce the new minister's senior status within cabinet and should provide extra leverage in obtaining the support of colleagues. Second, chairing this committee will create strong links between the minister of Aboriginal relations and the Privy Council Office. In addition to overseeing the structure of government, PCO also performs the crucial function of supporting the work of cabinet and its committees. Each cabinet committee has a dedicated secretariat within PCO, which provides guidance to the process of moving business through cabinet. In the thick of cabinet agenda making, it is not uncommon for PCO to exert a strong influence as gatekeeper, controlling what does and does not move forward. As the chair of the cabinet committee on Aboriginal relations, the new minister would be informed promptly and first hand, from a central-agency perspective, on how Aboriginal matters were progressing. This would increase the minister's ability to move issues through cabinet.

Finally, we foresee that there will be occasions when Aboriginal nations or peoples will meet with cabinet as the collective representative of the Crown. In the period before full treaty/nation government, these meetings would be with existing national Aboriginal organizations. These would not be cabinet meetings in the legal sense. Neither, however, would they be 'cap in hand' sessions, held so that Aboriginal peoples can make requests of cabinet. Instead, we see these meetings as a manifestation of the principle that Aboriginal governments and the government of Canada have common needs and interests that require joint planning and initiatives at the highest level.<sup>291</sup> Again, the practicalities of government business suggest that such meetings will be held in a more timely fashion if there are designated representatives of cabinet who generally attend. Chairing this group would confirm the stature of the minister as the senior cabinet member dedicated to Aboriginal issues. Existence of the committee itself



FIGURE 3.3  
Department of Aboriginal Relations: Proposed Structure



would mean that such meetings could involve knowledgeable substantive discussions, as well as have a ceremonial and symbolic character.

### *Portfolio of the minister of Aboriginal relations*

Figure 3.3 illustrates a proposed structure for the ministry of Aboriginal relations. It is intended to highlight the responsibilities assigned to the portfolio and to avoid the conflict of interest problem associated with combining negotiation and implementation responsibilities within the same departmental structure, as has been the case mostly recently with DIAND. The ministerial structure sketched in Figure 3.3 reflects the concept that a single minister is crucial to knit all the pieces of the new relationship together, while being able to provide specific and clear direction to officials responsible for policy, negotiation and implementation.

Initially, there are two main functions associated with fulfilling the minister's responsibilities: development of new federal policies associated with Aboriginal affairs and negotiation/engagement related to treaties, Aboriginal claims and self-government accords. Results of the sectoral and fiscal policy reviews recommended by the Commission should feed into discussions of treaties, claims and self-government accords. The need for a good link between the two suggests the wisdom of combining them in a single ministry.

Nonetheless, distinctions between the roles of policy development and negotiation are very real. The former implies the need for consultation with Aboriginal peoples, within the federal government and with provincial/territorial governments. These consultations will be oriented to developing federal policies that reflect the spirit of the new relationship and what the federal government thinks it can realistically accomplish, given fiscal and other constraints. The negotiation role involves continuous and intense engagement with Aboriginal nations and their governments. Although the negotiating atmosphere may be constructive, there will almost inevitably be differences in perspective that will cause the relationship to have its ups and downs. We think it is necessary to achieve the appropriate connections and distinctions between the policy and negotiation roles within the ministry itself. Specifically, we suggest that responsibility for the policy component of the ministry's role be vested in the deputy minister. This will be carried out through the work of three branches of the department: the policy branch, the Aboriginal finance branch and the transition branch. The specific functions of each of these are as follows.

#### *Policy branch*

- conducting sectoral policy reviews
- implementing and funding sectoral initiatives
- providing advice on the negotiating mandate
- overseeing intergovernmental relations with respect to policy review and initiatives

*Aboriginal finance branch*

- developing a fiscal framework
- continuing fiscal analysis
- providing advice on managing the fiscal envelope
- liaison with department of finance and treasury board secretariat
- conducting research and development on the fiscal framework of negotiations

*Transition branch*

- facilitating treaties/claims/accords
- implementing recognition policy
- overseeing *Indian Act* transition
- managing intergovernmental relations regarding transition

Responsibility for actual negotiations would be vested in another senior official holding associate deputy minister rank. This person's title would be Chief Crown Negotiator, Crown Treaty Office; as head of the Crown Treaty office the official would be responsible for negotiation of treaties, claims and self-government accords.

The chief Crown negotiator would be expected to work closely with the deputy and take direction from specific negotiation mandates given by cabinet and resulting from the work of the transition, Aboriginal finance, and policy branches of the department.

Both the deputy minister and the associate deputy minister would have significant contact with the minister of Aboriginal relations, as befits their important roles and the need for the minister to ensure that the policy development and negotiation functions are moving in concert.

The minister of Aboriginal relations would also be responsible for overseeing implementation of federal obligations under treaties, claims and self-government accords; for overseeing the actual transition from the *Indian Act*; and for supervising the implementation of new federal policies and programs in specific sectors, such as housing and health, that result from the various policy reviews we have recommended. This is the crucial oversight function associated with the new ministerial mandate. We foresee this occurring in two ways.

First, the minister's control of the fiscal envelope will result in effective leverage to induce action by other federal departments and agencies. We have already discussed the innovative and important nature of this aspect of our proposal.

In addition, we propose that the new department contain a distinct Crown implementation office. It would be responsible for oversight review of federal obligations relating to treaties, claims and self-government accords, the *Indian Act* transition, sectoral initiatives and the Crown's fiduciary obligations to Aboriginal nations. This office would perform comprehensive assessments of federal activities and prepare timely reports for the minister, cabinet and Parliament

(perhaps through a standing parliamentary committee). In part, its role would be similar to that of a comprehensive auditor. We have chosen, however, not to isolate this office from the new ministry structure, as is frequently the case with such functions. Instead, we suggest that it be included in the responsibilities of the deputy minister to make maximum use of its potential to provide early warning signals to the department's other branches and to the minister.

### *Our proposals and the North*

We have not referred extensively to the implications of our executive proposals for the northern mandate now associated with DIAND. This is because we see that mandate, as it relates to the North, being assumed by the territorial governments as they evolve. The varying approaches to self-government envisioned by Aboriginal peoples in the North, including nation-based government and public government, can be further developed and accommodated through the executive structure we propose.

### **Conclusion**

No institutional change will sustain the long-term fundamental political objective of reforming the relationship between the Aboriginal peoples of Canada and their fellow citizens, or even between Aboriginal nations and the Canadian political system. The institutional changes are necessary, but not sufficient in themselves. Also required is the sustained effort of individuals in many key positions of power and influence, and their ability to keep their attention on these longer-term goals.

We have highlighted the responsibility of the prime minister and cabinet to provide leadership, creativity and practical direction. We have lodged considerable responsibility for breaking new ground in our proposal for an unusually powerful federal minister of Aboriginal relations. The new minister's authority would come from the power of the purse, from the formal responsibility to oversee the entire range of federal behaviour with respect to Aboriginal peoples, and from the freedom from dealing directly with service delivery issues. This minister will be charged with making the ideals of the royal proclamation, the treaties and the other political accords a reality.

An essential complement to executive leadership will be the commitment of public servants charged with realizing the new relationship and the new agenda. With fresh institutions and a new mandate to work toward a more just relationship, we hope that appropriate attention will be paid to having the right skills and the right people in place within the new departments of Aboriginal relations and Indian and Inuit services. For example, we think that negotiators in the office of chief negotiator should be senior officials with excellent negotiating skills and a demonstrated capacity to arrive at successful outcomes despite



difficult circumstances, rather than people with a long history in the Department of Indian Affairs and Northern Development. Negotiators will also need a detailed mandate with sufficient breadth and authority to provide a real chance of attaining far-reaching agreements. The chief negotiator will need direct access to the minister, and through the minister to cabinet, to enable speedy decisions when required. We see the changes we propose as providing an opportunity for retaining the services of a significant number of Aboriginal people.

There is also a need to sensitize people through the federal government to the essence of the new relationship and to promote genuine commitment to the work ahead. To a considerable degree, we see this happening through leadership by example on the part of the political executive. This would involve an early announcement of the royal proclamation and a legislative agenda. We think that the new executive structure we propose will promote this.

Development and implementation of the new executive structure and fulfilment of the mandate we propose will occur over time. For example, development of new negotiating mandates related to treaties, claims and self-government accords should logically precede full staffing of the office of the chief negotiator and the commencement of full-scale negotiations. We sincerely hope, however, that unnecessary delays in implementation will be avoided. We think that our proposals related to the executive structure and to implementation of the new relationship are sufficiently consistent with trends in government organization that they can move ahead. For example, our proposals for the executive structure do not increase the total number of federal ministers. They are also consistent with the evolving government-to-government relationship between Aboriginal and territorial governments and Canada.

Finally, we think that these proposals can be implemented expeditiously. Precedent indicates that decisions about the structure of cabinet are initiated at the sole discretion of the prime minister. The mandate and organization of the Department of Aboriginal Relations and the Department of Indian and Inuit Services can be implemented initially by order in council.

The policy work that we foresee for the minister of Aboriginal relations and other federal departments and agencies need not derive its authority from any specific legislation, such as the *Indian Act*. Indeed, current government initiatives related to Aboriginal self-government are based on the federal government's broad constitutional responsibilities, not on the specific provisions of the *Indian Act*.

Ultimately, there will be a need for legislative change. This can be done retroactive to establishment of the new structure, as was the case with the major reorganization of the federal government undertaken in 1993. There is also a long list of federal legislation, on matters ranging from natural resources to health to employment, that may require modification in light of the new government organization and future policies related to Aboriginal peoples. This will be increas-

ingly so as the new relationship takes hold. These legislative changes are no different in content or complexity from those in other federal policy fields undertaken in the past.

## RECOMMENDATIONS

### The Commission recommends that

#### Structure of 2.3.45

Federal  
Government The government of Canada present legislation to abolish the Department of Indian Affairs and Northern Development and to replace it by two new departments: a Department of Aboriginal Relations and a Department of Indian and Inuit Services.

#### 2.3.46

The prime minister appoint in a new senior cabinet position a minister of Aboriginal relations, to be responsible for

- guiding all federal actions associated with fully developing and implementing the new federal/Aboriginal relationship, which forms the core of this Commission's recommendations;
- allocating funds from the federal government's total Aboriginal expenditures across the government; and
- the activity of the chief Crown negotiator responsible for the negotiation of treaties, claims and self-government accords.

#### 2.3.47

The prime minister appoint a new minister of Indian and Inuit services to

- act under the fiscal and policy guidance of the minister of Aboriginal relations; and
- be responsible for delivery of the government's remaining obligations to status Indians and reserve communities under the *Indian Act* as well as to Inuit.

#### 2.3.48

The prime minister establish a new permanent cabinet committee on Aboriginal relations that

- is chaired by the minister of Aboriginal relations;
- is cabinet's working forum to deliberate on its collective responsibilities for Aboriginal matters; and

- takes the lead for cabinet in joint planning initiatives with Aboriginal nations and their governments.

#### 2.3.49

The government of Canada make a major effort to hire qualified Aboriginal staff to play central roles in

- the two new departments;
- other federal departments with specific policy or program responsibilities affecting Aboriginal people; and
- the central agencies of government.

#### 2.3.50

The government of Canada implement these changes within a year of the publication of this report. Complying with this deadline sends a clear signal that the government of Canada not only intends to reform its fundamental relationship with Aboriginal peoples but is taking the first practical steps to do so.

## 4.4 Representation in the Institutions of Canadian Federalism

We have focused our attention so far on implementing Aboriginal self-government as one of three orders of government. As we suggested, this is the area of governance in which the Commission can make the greatest contribution. We recognize that federalism has two main pillars: self-rule and shared rule. Much of what we have written has been on the topic of Aboriginal self-rule. We turn now to the second component – how Aboriginal people can share in the governing of Canada.

A key component in the design of federal systems is how people are represented in federal institutions and processes. People can be represented directly in institutions and processes through elected or appointed representatives (as people are represented indirectly in the House of Commons and the Senate), or people can be represented indirectly through their governments, be they federal, provincial, territorial or Aboriginal (which we refer to as intergovernmental relations). What concerns us is how Aboriginal people can participate directly and more fully in the decision-making processes of Canadian institutions of government.

We wish to make two initial points. First, Canadian political institutions often lack legitimacy in the eyes of Aboriginal people. Many have noted that Aboriginal peoples were not involved in designing the Canadian state or in fashioning its institutions and processes. Second, there are good reasons to question

the capacity of Canadian political institutions to represent Aboriginal people. Until recently, Aboriginal people were systematically denied participation in the Canadian electoral process, and only a handful of Aboriginal people have sat in Parliament since Confederation.

## Representation in Parliament

To date, Aboriginal people have been prevented from playing an active role in sharing the governing of Canada; they have not been adequately represented in the federal structures of government. The Royal Commission on Electoral Reform and Party Financing, in its 1991 report, explored the reasons for this sorry state of affairs in some detail.<sup>292</sup> In the period before Confederation it was widely assumed that Aboriginal people were simply inferior or were to be excluded on grounds of their lack of 'civilization' and that they had to become assimilated before they could enjoy the benefits of citizenship.

Before the movement to universal suffrage, most Aboriginal people failed to meet the property ownership qualifications for voting. Although only men were eligible to vote at that time, these qualifications were made legally inapplicable to reserve-based Indian men. Then, from 1920 to 1960, the ground for exclusion appeared to reflect the belief that Indian people enjoying certain types of tax exemption should have no representation in the House of Commons.

With a few exceptions, everyone covered by the *Indian Act* was technically denied the franchise until 1920, and then very few could vote until 1960, when the franchise was extended to all Indian persons. Inuit were legislatively barred from voting from 1934 to 1950 and rarely enumerated for federal elections until the early 1960s. Inuit and the Innu of Labrador, like other citizens, received the right to vote in 1949 when Newfoundland joined Confederation. Métis and Indian people of the north-west faced criminal charges under the *Indian Act* if they met in public assembly in the decade following the Riel rebellion, effectively curtailing their political right of association. Although Métis people have been entitled to vote since Confederation on the basis that they are provincial residents, they have also faced problems of enumeration and had limited opportunities for exercising their franchise.<sup>293</sup>

Finally, Aboriginal people themselves have resisted participating in Canadian institutions of government. Since Aboriginal people played no role in the design of Canadian government institutions or the Confederation agreement, many see these as 'settler' institutions. In some cases, treaty nations view their relationship with Canada as one of nation-to-nation only, and they want their relationship mediated by their own governments and leaders through their treaties – not by another institution. In other cases, Aboriginal people think that they should have their own distinct institutions, leaving Parliament to non-Aboriginal people. This lack of participation by Aboriginal people in Canadian



institutions has been a growing problem in Canadian federalism and undermines the legitimacy of our system of government.

The extent of under-representation of Aboriginal people in Canadian governing institutions is startling. Since Confederation, almost 11,000 members of Parliament have been elected to the House of Commons. Of these, only 13 members have self-identified as Aboriginal people.<sup>294</sup> The record for the Senate is not much better, at one per cent of all senators appointed since Confederation. This is far from proportional to the Aboriginal population of Canada.

Two major initiatives in recent years have addressed the issue of Aboriginal representation in Canadian governing institutions – the report of the Royal Commission on Electoral Reform and Party Financing, and the Charlottetown Accord. In its final report, the Royal Commission on Electoral Reform and Party Financing advocated an innovative model that would see the creation of up to eight Aboriginal electoral districts in the House of Commons.<sup>295</sup> These districts would be created only if a sufficient number of Aboriginal people registered to vote in the designated district. The proposal guarantees a process for establishing these electoral districts rather than simply guaranteeing seats for Aboriginal people. The decision about whether they wish to have this type of representation would then rest with Aboriginal people.

The approach taken was limited by a decision not to make a recommendation that would trigger the general amending formula of the constitution, as a proposal for proportional representation by province and territory would do. The Aboriginal electoral districts proposal would simply require the consent of the House of Commons and the Senate.

A special enumeration of potential Aboriginal electors would be conducted, with a test for 'aboriginality' and a related dispute resolution procedure. An Aboriginal person would choose to vote in either the general electoral district or the Aboriginal one. A variant of this approach has been in use in New Zealand since 1867, with four seats set aside in the Parliament for Maori, the Indigenous people of New Zealand.<sup>296</sup>

The Charlottetown Accord of 1992 dealt only briefly with the representation of Aboriginal peoples in the House of Commons, proposing that the matter should be pursued by Parliament, in consultation with representatives of the Aboriginal peoples of Canada, after it received the final report of the House of Commons committee studying the recommendations of the Royal Commission on Electoral Reform and Party Financing.<sup>297</sup> The accord had much more to say about the representation of Aboriginal people in the Senate. It proposed guaranteed representation in the Senate for Aboriginal peoples. Aboriginal Senate seats would be additional to provincial and territorial seats, rather than drawing away from current allocations. The accord suggested that Aboriginal senators would have the same roles and powers as other senators, as well as the possibility that a double majority would be required to approve certain matters

affecting Aboriginal people. These issues and other details relating to the number of Aboriginal senators, the distribution of Senate seats, and the method of selecting Aboriginal senators were to be the subject of further discussion.<sup>298</sup>

It is clearly in the interests of all Canadians that Aboriginal peoples be represented more adequately and participate more fully in the institutions of Canadian federalism. This will help to build the moral and political legitimacy of such institutions in the eyes of Aboriginal people.

However, we are concerned that efforts to reform the Senate and the House of Commons may not be compatible with the foundations for a renewed relationship built upon the inherent right of Aboriginal self-government and nation-to-nation governmental relations. Three orders of government imply the existence of representative institutions that provide for some degree of majority control, not minority or supplementary status.

### **An Aboriginal parliament as a first step toward a House of First Peoples**

A third chamber of Parliament would be a logical extension of three orders of government. A separate chamber, the Senate, was designed to represent the interests of Canada's regions and provinces (although in practice it has been less than successful). It follows that Aboriginal nations should also have distinct representation in Parliament, which could take the form of a third chamber established alongside the existing House of Commons and Senate. This third house would provide a means for the Aboriginal peoples of Canada to share in governing the country, while at the same time acknowledging the distinct interests, cultures and values of Aboriginal peoples. It would give Aboriginal people a permanent voice in processes of national decision making, in what might be called 'shared-rule decisions'. The idea of a third chamber is a relatively new one, first proposed during the Canada round of constitutional negotiations that led to the Charlottetown Accord. See Appendix 3B for a summary of the proposal by the Native Council of Canada (now the Congress of Aboriginal Peoples) for a House of First Peoples.

A third chamber representing Aboriginal nations would address a number of problems. It would provide an institutional link whereby Aboriginal peoples' concerns could be voiced in a formal and organized way in the decision-making process of the Parliament of Canada. The third chamber approach would also avoid conflict with provincial and territorial governments, all of which – in the Charlottetown Accord – saw the Senate as representing primarily regional and provincial interests. A third chamber would be freed from accommodating the regional and provincial interests of the Senate.

If a third chamber is to be established, it should have real power. By this, we mean the power to initiate legislation and to require a majority vote on matters crucial to the lives of Aboriginal peoples. This legislation would be referred

to the House of Commons for mandatory debate and voting. We recognize that, to accomplish this objective, the constitution would have to be amended. To move immediately in this area, we suggest a staged approach, which would not require a constitutional amendment initially. While full implementation will await a constitutional amendment and the rebuilding of Aboriginal nations, the government of Canada can act now, in terms of public policy and legislation, by enacting an Aboriginal Parliament Act.

Although the idea of an Aboriginal parliament is new to Canada, such institutions do exist in other countries. The first Aboriginal parliaments were established in northern Europe. There is much to be learned from the experience of the Saami parliaments of Scandinavia.<sup>299</sup> The Saami (or Lapps) are the indigenous people of what was formerly called Lapland (now Saamiland), whose traditional territories are now divided among Sweden, Norway, Finland and Russia. There are approximately 75,000 Saami dispersed across these countries.<sup>300</sup> The *Saami Codicil of 1751*, an addendum to a treaty between Sweden and what was then Denmark-Norway, recognized some of the Aboriginal rights of the Saami, including the customary law of the Saami (with exclusive jurisdiction of Saami courts over Saami disputes), the acknowledgement of a Saami Nation, and the free movement of Saami reindeer herders.

The Saami parliament in Norway – the *Sāmediggi* – was created following the passage of the *Saami Act* by the Norwegian assembly in 1987. The legislation also recognized the Saami as a distinct people entitled to particular rights in such fields as culture, language and social life. There are 13 Saami constituencies, each of which returns three members. Eligible voters are enrolled on a Saami electoral register. To be eligible, voters must identify as a Saami and declare Saami as their mother tongue or have a parent or grandparent who does. The powers of the *Sāmediggi* are very limited, however. It is to be consulted on appropriate matters, and it is to bring matters before public authorities and private institutions.

The Finnish Saami parliament, established in the early 1970s and officially called the Delegation for Saami Affairs, has 20 elected members. Of these, 12 are elected from four Saami constituencies, and two each from four Saami locals. Neither the Norwegian nor the Finnish Saami institutions have legislative functions. In this sense, the use of the term 'parliaments' is misleading.

Simply put, the Saami parliaments lack clout. Nor were the Saami people adequately involved in the design of these institutions. These are not inherent flaws in the concept of an Aboriginal parliament, however. Aboriginal parliaments can have real power, and Aboriginal peoples can be fully involved, if not primarily responsible, for the structure and processes of such institutions.

Several other problems of adaptation present themselves. For example, unlike Finland and Norway, Canada has a federal system of government. Also, unlike the Saami, who are a relatively homogeneous people, Aboriginal peoples in Canada – Indian, Inuit and Métis – are diverse in language, culture and geography.

## RECOMMENDATIONS

### The Commission recommends that

#### An Aboriginal Parliament 2.3.51

The federal government, following extensive consultations with Aboriginal peoples, establish an Aboriginal parliament whose main function is to provide advice to the House of Commons and the Senate on legislation and constitutional matters relating to Aboriginal peoples.

#### 2.3.52

The Aboriginal parliament be developed in the following manner:

- (a) the federal government, in partnership with representatives of national Aboriginal peoples' organizations, first establish a consultation process to develop an Aboriginal parliament; major decisions respecting the design, structure and functions of the Aboriginal parliament would rest with the Aboriginal peoples' representatives; and
- (b) following agreement among the parties, legislation be introduced in the Parliament of Canada before the next federal election, pursuant to section 91(24) of the *Constitution Act, 1867*, to create an Aboriginal parliament.

Although we do not wish to circumscribe the role of an Aboriginal parliament, we suggest that it should provide advice to the House of Commons and the Senate in the following matters:

### *Legislation*

- legislation relating to matters pertaining to section 91(24) of the constitution ("Indians, and Lands reserved for the Indians");
- legislation relating to Aboriginal self-government, treaties and lands;
- legislation of general application, but whose subject matter would directly affect Aboriginal peoples in relation to their identity, language, tradition, culture, land, water and environment; and
- legislation flowing from the recommendations of this Commission.

### *Constitutional matters relating to Aboriginal peoples*

- Sections 25 and 35 of the constitution (shielding certain Aboriginal and treaty rights from a construction of the *Canadian Charter of Rights and*



*Freedoms* that would abrogate or derogate from them and recognizing and affirming Aboriginal and treaty rights, including, we believe, the inherent right of Aboriginal self-government);

- other rights and freedoms that pertain to the Aboriginal peoples of Canada.

### *Review and oversight*

- reports from treaty commissions;
- the proposed royal proclamation, the proposed ministry of Aboriginal relations, and the proposed Aboriginal Lands and Treaties Tribunal;
- Aboriginal self-government and land claims agreements; and
- monitoring of the implementation of Aboriginal self-government.

### *Fact finding and investigation*

- Aboriginal parliamentarians could sit on joint committees of the House of Commons and the Senate on specific issues, such as justice and solicitor general and the standing committee on Aboriginal affairs.
- An Aboriginal parliament could receive references from the House of Commons or the Senate for investigation and have the power to hold hearings. This would enable an Aboriginal perspective to be brought to bear on possible legislative initiatives while they are still at an early stage. A similar role has been played in the past with respect to law reform commissions. For this reason, we think that the Aboriginal parliament should have a research branch to assist its members to fulfil this and other functions.

As the preceding list implies, an Aboriginal parliament should have the option of reviewing all legislation coming before the Parliament of Canada. This would permit a careful clause-by-clause assessment of proposed legislation from the perspective of Aboriginal peoples' representatives. It would also be helpful for the Aboriginal parliament to meet with the minister of Aboriginal relations on a regular basis, and at least twice per year.

This brings us to the question of how Aboriginal peoples are to be represented in an Aboriginal parliament. Here, we find the proposal of the Congress of Aboriginal Peoples instructive: base the representation on the nation or peoples. Each nation or people would have its own representative, yielding an Aboriginal parliament of between 75 and 100 seats, according to the proposal. Larger Aboriginal nations or peoples, such as the Cree, Ojibwa, Mi'kmaq, Dene, Inuit, and Métis – or confederacies of nations such as the Iroquois Confederacy and the Blackfoot Confederacy – might have more than one representative. Addressing representation in this way would have the added advantage of reinforcing what we consider to be a fundamental value of the new relationship between Aboriginal and non-Aboriginal people – that it is a nation-

to-nation relationship within Canada. The issue of what constitutes an Aboriginal nation would be resolved by applying the proposed recognition policy.

While the fully developed and constitutionally entrenched House of First Peoples would eventually have representatives of up to 60 to 80 Aboriginal nations, we suggest that it would be wise to start with a smaller number of representatives for the Aboriginal parliament. Based on the work of the Royal Commission on Electoral Reform and Party Financing, it might be appropriate to begin, as an interim step, by allocating seats by province and territory. The Aboriginal parliament could begin with two Aboriginal constituencies per province and territory, with more populous regions receiving additional seats. For example, for each 50,000 people who identify as Aboriginal persons, an additional seat could be added. Roughly speaking, this would give Ontario three additional seats; British Columbia, Alberta, Manitoba and Saskatchewan two additional seats; and Quebec one additional seat, for a total of 36 seats in the initial Aboriginal parliament. As nations rebuild themselves, representation in the Aboriginal parliament would shift from representation by province to representation by nation.

## RECOMMENDATION

The Commission recommends that

Elections to 2.3.53

Aboriginal  
Parliament

- (a) Aboriginal parliamentarians be elected by their nations or peoples; and
- (b) elections for the Aboriginal parliament take place at the same time as federal government elections to encourage Aboriginal people to participate and to add legitimacy to the process.

Several reasons led us to this recommendation. The first is that an appointed parliament, like the present Senate, lacks legitimacy in the eyes of many Canadians. Second, it would be more difficult to claim that an Aboriginal parliament did not truly represent the Aboriginal peoples of Canada if its members were elected. Aboriginal parliamentarians would serve the same terms, typically from four to five years, as federal members of Parliament.

It would be necessary to have a roll or list of voters, and this would entail the enumeration of Aboriginal Canadians. An enumeration of Aboriginal voters would help to ensure that the process is fair and that the parliamentarians are representative.

## RECOMMENDATION

The Commission recommends that

Enumeration 2.3.54

The enumeration of Aboriginal voters take place during the general enumeration for the next federal election.

## Conclusion

The creation of an Aboriginal parliament would not be a substitute for self-government by Aboriginal nations. Rather, it is an additional institution for enhancing the representation of Aboriginal peoples within Canadian federalism. The design of the institution, however, must provide for more than symbolic representation. At the centre of our proposal for an Aboriginal parliament is the principle that the renewed relationship between Canada and Aboriginal peoples is a nation-to-nation relationship that supports the inherent right of Aboriginal self-government. The proposed powers and responsibilities of an Aboriginal parliament reflect this principle and provide the basis for an effective role for Aboriginal nations in the decision-making processes of the Parliament of Canada.

## NOTES

1. Based on a story by Phil Lane, Jr., Four Worlds Development, University of Lethbridge, Lethbridge, Alberta, as retold by Richard Wagamese.
2. See the *Constitution Act, 1982*, s. 35(2).
3. Clement Chartier for Metis Family and Community Justice Services Inc., "Governance Study: Métis Self-Government in Saskatchewan", research study prepared for the Royal Commission on Aboriginal Peoples [RCAP] (1995). For information about research studies prepared for RCAP, see *A Note About Sources* at the beginning of this volume.
4. Chiefs of Ontario, "Submission to the Royal Commission on Aboriginal Peoples" (1993), p. 19. For information about briefs submitted to RCAP, see *A Note About Sources* at the beginning of this volume.
5. Gerald R. Alfred for Mohawk Council of Kahnawake, "The Meaning of Self-Government in Kahnawake", research study prepared for RCAP (1994). Difficulties with the use of the term are also noted in the testimony of Oren Lyons, Akwesasne, 3 May 1993 and Leonard Nelson, Roseau River, Manitoba, 8 December 1992.

6. Federation of Saskatchewan Indian Nations, "First Nations Self-Government: A Special Research Report", research study prepared for RCAP (1995).
7. Alfred, "The Meaning of Self-Government" (cited in note 5).
8. Mohawk Councils of Akwesasne, Kahnawake and Kanesatake, "A Joint Statement on the Inherent Right of Self-Determination and the Exercise of that Right by Akwesasne, Kahnawake and Kanesatake" (1995), p. 2.
9. Inuit Tapirisat of Canada, "Preliminary Submission to the Royal Commission on Aboriginal Peoples" (1993), p. 16.
10. Rosemarie Kuptana, as quoted in Wendy Moss, "Inuit Perspectives on Treaty Rights and Governance Issues", in RCAP, *Aboriginal Self-Government: Legal and Constitutional Issues* (Ottawa: Supply and Services, 1995), p. 84 [note omitted].
11. Métis National Council, "The State of Research and Opinion on the Metis Nation of Canada", Intervener Participation Program [IPP] brief submitted to RCAP (1993), pp. 1 and 129.
12. See Chartier, "Governance Study" (cited in note 3).
13. See, for example, Métis Nation of Quebec, RCAP transcripts, Montreal, Quebec, 28 May 1993.
14. Métis National Council, "The State of Research" (cited in note 11), p. 130.
15. Métis National Council, "The State of Research", pp. 23-24.
16. Manitoba Metis Federation, "A Report on Metis Self-Governance in Urban Manitoba", research study prepared for RCAP (1995).
17. Union of Ontario Indians, "Anishinabek Traditional Governing, A New Era for the Anishinabek: Understanding the Past for the Challenges of Tomorrow", brief submitted to RCAP (1993), pp. 4-5.
18. Nancy Wachowich, "Women's Traditional Governance Research Project: Pond Inlet Inuit Contribution", research study prepared for RCAP (1994).
19. Union of Ontario Indians, "Anishinabek Traditional Governing" (cited in note 17), p. 18.
20. Rene M.J. Lamothe, "'It Was Only a Treaty': A Historical View of Treaty 11 According to the Dene of the Mackenzie Valley", research study prepared for RCAP (1993).
21. Pauktuutit (Inuit Women's Association), *The Inuit Way: A Guide to Inuit Culture* (Ottawa: n.d.), pp. 15-16.
22. Lamothe, "A Historical View of Treaty 11" (cited in note 20).
23. Deh Cho Tribal Council, "Dene Decision Making", brief submitted to RCAP (1993), p. 23, quoting George Barnaby of Fort Good Hope, Vice-President of the Indian Brotherhood of the Northwest Territories, speaking to the Berger inquiry (1977).



24. Chiefs of Ontario, "Submission to the Royal Commission" (cited in note 4), p. 13.
25. Chiefs of Ontario, "Submission to the Royal Commission", p. 7.
26. Paul Williams and Curtis Nelson, "Kaswentha", research study prepared for RCAP (1995).
27. Métis National Council, "The State of Research" (cited in note 11), p. 124.
28. Métis National Council, "The State of Research", pp. 124-126.
29. Pauktuutit, *The Inuit Way* (cited in note 21), p. 6.
30. Keith T. Carlson for the Stó:lo Tribal Council, "Leadership Review: The Indian Act Election System, Traditional Stó:lo Socio-political Structures, and Recommendations for Change", brief submitted to RCAP (1993), pp. 30-32 [note omitted].
31. Aboriginal Women's Council of British Columbia, "Traditional Self-Government, Economic Development and Aboriginal Women", brief submitted to RCAP (1992), p. 7.
32. Wachowich, "Women's Traditional Governance" (cited in note 18).
33. Wachowich, "Women's Traditional Governance".
34. Women of the Metis Nation, "Women Who Own Themselves: The Final Report on the Conference on Metis Women and Governance", brief submitted to RCAP (1993), pp. 25-27.
35. Ontario Native Women's Association, "A Preliminary Study: Anishnabequek and their Families in Ontario", IPP brief submitted to RCAP (1993), p. ii.
36. Marc G. Stevenson, "Traditional Inuit Decision-Making Structures and the Administration of Nunavut", research study prepared for RCAP (1993).
37. Council of Elders, "A Negotiations Process for Off-Reserve Aboriginal Peoples in Ontario", brief submitted to RCAP (1993), p. 6.
38. Stevenson, "Traditional Inuit Decision-Making Structures" (cited in note 36).
39. Chief Peter Quaw, RCAP transcripts, Stoney Creek, British Columbia, 18 June 1992.
40. Council of Elders, "A Negotiations Process" (cited in note 37).
41. Williams and Nelson, "Kaswentha" (cited in note 26).
42. Pauktuutit (Inuit Women's Association), "Pauktuutit Submission to the Royal Commission on Aboriginal Peoples" (1993).
43. Carlson, "Leadership Review" (cited in note 30), pp. 17-18 [note omitted].
44. Union of Ontario Indians, "Anishinabek Traditional Governing" (cited in note 17), p. 39.
45. Union of Ontario Indians, "Anishinabek Traditional Governing".
46. Lamothe, "A Historical View of Treaty 11" (cited in note 20).

47. Williams and Nelson, "Kaswentha" (cited in note 26). See also Kenneth Deer, RCAP transcripts, Kahnawake, Quebec, 6 May 1993.
48. Williams and Nelson, "Kaswentha". See also Deer, RCAP transcripts.
49. Stevenson, "Traditional Inuit Decision-Making Structures" (cited in note 36).
50. Stevenson, "Traditional Inuit Decision-Making Structures".
51. Stevenson, "Traditional Inuit Decision-Making Structures".
52. Stevenson, "Traditional Inuit Decision-Making Structures".
53. Union of Ontario Indians, "Anishinabek Traditional Governing" (cited in note 17), p. 13.
54. Council of Elders, "A Negotiations Process" (cited in note 37), p. 5.
55. Deh Cho Tribal Council, "Dene Decision Making" (cited in note 23), p. 21.
56. B.C. Native Women's Society, "Self-Government: The Quest for Self-Determination and Self-Reliance of Aboriginal Peoples", brief submitted to RCAP (1993), p. 11.
57. Williams and Nelson, "Kaswentha" (cited in note 26).
58. Deh Cho Tribal Council, "Dene Decision Making" (cited in note 23).
59. Carlson, "Leadership Review" (cited in note 30), p. 15.
60. Union of Ontario Indians, "Anishinabek Traditional Governing" (cited in note 17), p. 39.
61. Assembly of First Nations, "Reclaiming our Nationhood: Strengthening our Nation", brief submitted to RCAP (1993), p. 16.
62. See for example Teslin Tlingit First Nation, "Aboriginal Self-Government and Judicial Systems", research study prepared for RCAP (1995); Carlson, "Leadership Review" (cited in note 30).
63. See Council of Elders, "A Negotiations Process" (cited in note 37); Women of the Metis Nation, "Women Who Own Themselves" (cited in note 34), pp. 25-27; Marilyn Fontaine, RCAP transcripts, Winnipeg, Manitoba, 23 April 1992.
64. Teslin Tlingit, "Aboriginal Self-Government" (cited in note 62).
65. See Robert Pasco, Chief of the Oregon Jack Creek Indian Band, for the Nlaks'pamux Nation, RCAP transcripts, Merritt, British Columbia, 5 November 1992.
66. Metis Nation of Alberta, "Submission to the Royal Commission on Aboriginal Peoples" (1993), p. 59.
67. RCAP transcripts, Moose Factory, Ontario, 9 June 1992.
68. Federation of Saskatchewan Indian Nations, "First Nations Self-Government" (cited in note 6), pp. 17-18.

69. Andrew Bear Robe for the Siksika Nation, "The Historical, Legal and Current Basis for Siksika Nation Governance, Including its Future Possibilities Within Canada", research study prepared for RCAP (1994).
70. Alfred, "Meaning of Self-Government" (cited in note 5).
71. Metis Settlements General Council, "Aboriginal Governance Project", research study prepared for RCAP (1994).
72. Jean A. Knockwood, "The Shubenacadie Band Council and the Indian Brook Band Case Study on Self Governance", research study prepared for RCAP (1993).
73. The Pacific Metis Federation, "Report to the Royal Commission on Aboriginal Peoples", brief submitted to RCAP (1993), p. 12.
74. Nishnawbe-Aski Nation, "Intervention Report: Royal Commission on Aboriginal Peoples", brief submitted to RCAP (1993).
75. United Chiefs and Councils of Manitoulin, "UCCM Fish and Wildlife Project", brief submitted to RCAP (1993), p. 45.
76. Dwight Dorey, "Aboriginal Self Government for the Mi'Kmaq People of Nova Scotia: Essential Features of a Workable Model", M.A. thesis, Carleton University, Ottawa, 1993.
77. See, for example, Moss, "Inuit Perspectives" (cited in note 10).
78. See the *Nunavut Act*, S.C. 1993, c. 28, and "Information Sheet: Design of the Nunavut Government", document issued for the Nunavut Conference, Iqaluit: 22-23 February 1995.
79. Nunavik Constitutional Committee, "Draft Constitution of Nunavik" (28 January 1991), part IV, reproduced in Marc Malone and Carole Lévesque, "Nunavik Government", research study prepared for RCAP (1994).
80. Inuvialuit Regional Corporation, "Inuvialuit Self-Government" in "Political Developments in the Inuvialuit Settlement Region", research study prepared for RCAP (1993). Recent proposals have envisaged the establishment of a Western Arctic Regional Government involving Inuvialuit and Gwich'in communities. See, for example, Constitutional Development Steering Committee, Western Northwest Territories, *Summaries of Member Group Research Reports* (Yellowknife, N.W.T.: 1994), pp. 5-8.
81. See Moss, "Inuit Perspectives" (cited in note 10).
82. Inuit Committee on National Issues, *Completing Canada: Inuit Approaches to Self-Government* (Kingston: Institute of Intergovernmental Affairs, Queen's University, 1987), p. 24.
83. Chartier, "Governance Study" (cited in note 3).
84. RCAP, *Aboriginal Peoples in Urban Centres*, Report of the National Round Table on Aboriginal Urban Issues (Ottawa: Supply and Services, 1993), p. 55.

85. RCAP, *Aboriginal Peoples in Urban Centres*, pp. 18-19.
86. S.C. 1994, c. 35, s. 11(1)(b) and schedule III, part II. See also *Umbrella Final Agreement Between the Government of Canada, the Council for Yukon Indians and the Government of the Yukon* (Ottawa: Supply and Services, 1993); and Peter W. Hogg and Mary Ellen Turpel, "Implementing Aboriginal Self Government: Constitutional and Jurisdictional Issues", in RCAP, *Aboriginal Self-Government* (cited in note 10), and 74 Can. Bar Rev. 1995, p. 187.
87. Bear Robe, "Basis for Siksika Nation Governance" (cited in note 69).
88. See Del C. Anaquod, "Urban Institutional Development Case Study – Regina", research study prepared for RCAP (1993).
89. See Assembly of Manitoba Chiefs, "Planning Change", brief submitted to RCAP (1993), p. 11; Federation of Saskatchewan Indian Nations, "First Nations Self-Government" (cited in note 6); and Anaquod, "Urban Institutional Development".
90. Métis National Council, "The State of Research" (cited in note 11); Chartier, "Governance Study" (cited in note 3); Manitoba Metis Federation, "Metis Self-Governance" (cited in note 16).
91. Marc LeClair, "Métis Self-Government Origins and Urban Institutions", brief submitted to RCAP (1993), p. 1.
92. Chartier, "Governance Study" (cited in note 3).
93. Métis National Council, "The State of Research" (cited in note 11).
94. RCAP, "Aboriginal Peoples in Urban Centres" (cited in note 84), p. 57.
95. The Assembly of Aboriginal Peoples of Saskatchewan Inc., "Report to the Royal Commission on Aboriginal Peoples", brief submitted to RCAP (1993) pp. 7-8. The Assembly was incorporated in 1988 to represent people affected by Bill C-31 and those seeking reinstatement.
96. Native Council of Canada [Congress of Aboriginal Peoples], *The First Peoples Urban Circle: Choices for Self-Determination. The National Perspective*, Book 1 (Ottawa: Native Council of Canada, 1993), pp. 43-44.
97. An overview of these models is provided in Native Council of Canada, "Summary of IPP Submission, Royal Commission on Aboriginal Peoples" (1993).
98. Ontario Native Women's Association, "A Preliminary Study" (cited in note 35), p. 2.
99. Chiefs of Ontario, "Submission to the Royal Commission" (cited in note 4), p. 2.
100. Metis Settlements General Council, "Metis Settlements Governance Legislation: Community Perspectives", brief submitted to RCAP (1993).
101. Manitoba Metis Federation, "Metis Self-Governance" (cited in note 16), pp. 14-15.
102. "Information Sheet: Design of the Nunavut Government" (cited in note 78).



103. See Inuvialuit Regional Council, "Inuvialuit Self-Government" (cited in note 80); Constitutional Development Steering Committee, *Summaries of Member Group Research Reports* (cited in note 80).
104. See Russel Lawrence Barsh, "Aboriginal Self-Government in the United States: A Qualitative Political Analysis", research study prepared for RCAP (1993).
105. *R. v. Sparrow*, [1990] 1 S.C.R. 1075. It has yet to be decided whether this exception, recognized in the *Sparrow* case, would apply not only to federal laws but also to provincial laws. For discussion, see Brian Slattery, "First Nations and the Constitution: A Question of Trust" (1992) 71 Can. Bar Rev. 261 at 282-87.
106. Among extensive writings on self-determination, see especially S. James Anaya, "A Contemporary Definition of the International Norm of Self-Determination" (1993) 3 Transnational Law & Contemporary Problems 131; S. James Anaya, "The Capacity of International Law to Advance Ethnic or Nationality Rights Claims" (1990) 75 Iowa Law Review 837; Alain Bissonnette, "Le droit à l'autonomie gouvernementale des peuples autochtones: un phénix qui renaîtra de ses cendres" (1993) 24 R.G.D. 5; Martti Koskenniemi, "National Self-Determination Today: Problems of Legal Theory and Practice" (1994) 43 I.C.L.Q. 241; Patrick Macklem, "Normative Dimensions of the Right of Aboriginal Self-Government", in RCAP, *Aboriginal Self-Government* (cited in note 10), p. 1; Avishai Margalit and Joseph Raz, "National Self-Determination"; *Journal of Philosophy* 87 (1990), p. 439; Brian Slattery, "The Paradoxes of National Self-Determination" (1994) 32 Osgoode Hall L. J. 703; Mary Ellen Turpel, "Indigenous Peoples' Rights of Political Participation and Self-Determination: Recent International Legal Developments and the Continuing Struggle for Recognition" (1992) 25 Cornell Int'l L. J. 579.
107. Paul Sieghart, *The Lawful Rights of Mankind: An Introduction to the International Legal Code of Human Rights* (Oxford: Oxford University Press, 1985).
108. *Re Mitchell and the Queen* (1983), 42 O.R. (2nd) 481 at 492. See also Dickson C.J.C. (dissenting) in *Re Public Service Employee Relations Act (Alta.)* [1987], 1 S.C.R. 313 at 348-349: "Canada has thus obliged itself internationally to ensure within its borders the protection of certain fundamental rights and freedoms which are also contained in the *Charter*. The general principles of constitutional interpretation require that these international obligations be a relevant and persuasive factor in *Charter* interpretation."
109. United Nations, *Resolutions Adopted by the General Council During Its Twenty-First Session* (New York: United Nations, 1967), p. 165.
110. See "Draft Declaration as Agreed upon by the Members of the Working Group at Its Eleventh Session", United Nations, Economic and Social Council, E/CN.4/Sub.2/1994/2/Add.1, 20 April 1994. See also "Draft Declaration on the Rights of Indigenous Peoples" (1994) 1 C.N.L.R. 40.
111. Erica-Irene A. Daes, "Discrimination Against Indigenous Peoples: Explanatory Note Concerning the Draft Declaration on the Rights of Indigenous Peoples", United Nations, Economic and Social Council, E/CN.4/Sub.2/1993/26/Add.1,

- 19 July 1993. This note refers to an earlier draft of the Declaration, dated 8 June 1993, in which Article 3 took a different form than that found in the current draft. Nevertheless, in our opinion, the background analysis supplied by Daes is equally helpful for understanding Article 3 in its current form. See also Erica-Irene A. Daes, "Some Considerations on the Rights of Indigenous Peoples to Self-Determination" (1993) 3 *Transnational Law & Contemporary Problems* 1.
112. See Donat Pharand, "The International Labour Organisation Convention on Indigenous Peoples (1989): Canada's Concerns", in RCAP, *Canada's Fiduciary Obligation to Aboriginal Peoples in the Context of Accession to Sovereignty by Quebec*, Volume 1, *International Dimensions* (Ottawa: Supply and Services, 1995), p. 132.
  113. See Thomas R. Berger, *A Long and Terrible Shadow: White Values, Native Rights in the Americas, 1492-1992* (Vancouver: Douglas and McIntyre Ltd., 1991); Menno Boldt and J. Anthony Long, "Tribal Philosophies and the Canadian Charter of Rights and Freedoms", in *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights*, ed. Menno Boldt and J. Anthony Long (Toronto: University of Toronto Press, 1985), pp. 174-175; Patrick Macklem, "Distributing Sovereignty: Indian Nations and Equality of Peoples" (1993) 45 *Stanford Law Review* 1311 at 1324-1327; and Slattery, "First Nations and the Constitution" (cited in note 105) 261 at 273-274.
  114. Paul L.A.H. Chartrand, "Aboriginal Self-Government: The Two Sides of Legitimacy", in Susan D. Phillips, ed., *How Ottawa Spends: A More Democratic Canada...? 1993-1994* (Ottawa: Carleton University Press, 1993), pp. 234, 236.
  115. Inuit Tapirisat of Canada, "Submission of the Inuit Tapirisat of Canada to the Royal Commission on Aboriginal Peoples" (1994), p. 38 [note omitted].
  116. By contrast, some of the early legislation included the test of 'Indian blood' among the criteria governing membership; see, for example, *An Act Providing...for the Management of Indian and Ordnance Lands*, S.C. 1868, c. 42, s. 15, discussed in Sharon H. Venne, ed., *Indian Acts and Amendments, 1868-1975: An Indexed Collection* (Saskatoon: University of Saskatchewan Native Law Centre, 1981), p. 3. It seems very doubtful that racial criteria as such had much basis in the laws and practices of Aboriginal nations.
  117. RCAP, *Partners in Confederation: Aboriginal Peoples, Self-Government, and the Constitution* (Ottawa: Supply and Services, 1993); RCAP, *The Right of Aboriginal Self-Government and the Constitution: A Commentary* (Ottawa: 13 February 1992).
  118. See Catherine Bell, "Comment on Partners in Confederation: A Report on Self-Government by the Royal Commission on Aboriginal Peoples" (1993) 27 *U.B.C.L. Rev.* 361; Canadian Bar Association, "Aboriginal Civil Jurisdiction in Canada", brief submitted to RCAP (1993); Bob Freedman, "The Space for Aboriginal Self-Government in British Columbia: The Effect of the Decision of the British Columbia Court of Appeal in *Delgamuukw v. British Columbia*" (1994) 28 *U.B.C.L. Rev.* 49; Sylvain Lussier, "Réflexions sur 'Partenaires au sein de la Confédération' et le droit 'inhérent' à l'autonomie gouvernementale", in *The*

- Inherent Right of Aboriginal Self-Government*, Volume 1 (Toronto: Canadian Bar Association Continuing Legal Education Program, 1994); Kenneth J. Tyler, "Another Opinion: A Critique of the Paper Prepared by the Royal Commission on Aboriginal Peoples Entitled: 'Partners in Confederation'", in *The Inherent Right of Aboriginal Self-Government*, Volume 2 (Toronto: Canadian Bar Association Continuing Legal Education Program, 1994).
119. This account is based largely on the following sources, which differ somewhat in their details: *Connolly v. Woolrich* (1867), 17 *Rapports judiciaires révisés de la Province de Québec* 75 (Sup.C.) (for other sources of this case, see note 121); and *Dictionary of Canadian Biography* (Toronto: University of Toronto Press, 1966), Volume 7, pp. 204-206 ("Connolly, William"), Volume 9, pp. 149-150 ("Connolly, Suzanne").
  120. National Archives of Canada, Manuscript Group 29, B15, Robert Bell Papers, "Reminiscences of Henry Connolly"; information kindly supplied by James Morrison, Legal and Historical Research, Haileybury, Ontario.
  121. *Connolly v. Woolrich* (1867) (cited in note 119); see also 11 *Lower Canada Jurist* 197 and Brian Slattery, ed., *Canadian Native Law Cases* (Saskatoon: University of Saskatchewan Native Law Centre, 1980), Volume 1, 70. The decision on appeal is reported under the name *Johnstone v. Connolly* (1869), 17 *Rapports judiciaires révisés de la Province de Québec* 266 (Quebec Queen's Bench); it is also reported in 1 *Revue légale* (Old Series) 253 and Brian Slattery, ed., *Canadian Native Law Cases*, Volume 1, 151. The case was settled out of court before the Privy Council dealt with it.
  122. This account is based on *Connolly v. Woolrich* at 83-87.
  123. *Connolly v. Woolrich* at 83-84.
  124. 8 U.S. (6 Peters) 515 (1832).
  125. The original passage is found in *Worcester v. Georgia* at 547; it is quoted in *Connolly v. Woolrich* (cited in note 119) at 86.
  126. *Connolly v. Woolrich* at 82.
  127. For other cases dealing with the issue of Aboriginal customary law, see *R. v. Nane-quis-a Ka* (1889), 1 *Territories Law Reports* 211 (N.W.T. S.C.); *R. v. Bear's Shin Bone* (1899), 3 C.C.C. 329 (N.W.T. S.C.); *Re Noah Estate* (1961), 32 D.L.R. (2d) 185 (N.W.T. Terr. Ct.); *Re Adoption of Katie* (1961), 32 D.L.R. (2d) 686 (N.W.T. Terr. Ct.); *Re Beaulieu's Adoption Petition* (1969), 3 D.L.R. (3d) 479 (N.W.T. Terr. Ct.); *Re Kitchoalik and Tucktoo* (also reported as *Re Deborah*) (1972), 28 D.L.R. (3d) 483 (N.W.T. C.A.), upholding the decision of the Northwest Territories Territorial Court reported at (1972), 27 D.L.R. (3d) 225; *Re Wah-Shee* (1975), 57 D.L.R. (3d) 743 (N.W.T. S.C.); *Re Tagornak Adoption Petition*, [1984] 1 C.N.L.R. 185 (N.W.T. S.C.); *Michell v. Dennis and Dennis*, [1984] 2 C.N.L.R. 93 (B.C. S.C.); *Casimel v. Insurance Corporation of British Columbia*, [1994] 2 C.N.L.R. 22 (B.C. C.A.), [1992] 1 C.N.L.R. 84 (B.C. S.C.); *Delgamuukw v. British Columbia*

- (1993), 5 C.N.L.R. (B.C. C.A.). For discussion, see Norman K. Zlotkin, "Judicial Recognition of Aboriginal Customary Law in Canada: Selected Marriage and Adoption Cases" (1984) 4 C.N.L.R. 1; and Brian Slattery, "Understanding Aboriginal Rights" (1987) 66 Can. Bar Rev. 727 at 738-39.
128. R.S.C. 1985, c. I-5.
129. S.A. 1990, c. M-14.3.
130. In *Re Manitoba Language Rights*, [1985] 1 S.C.R. 721 at 750-752, the Supreme Court of Canada held unanimously that the rule of law was a fundamental postulate of the Canadian constitutional structure, even though it was not explicitly set out in any operative provision. The Court went on to conclude, at p. 752: "In other words, in the process of Constitutional adjudication, the Court may have regard to unwritten postulates which form the very foundation of the Constitution of Canada. In the case of the *Patriation Reference*...this unwritten postulate was the principle of federalism. In the present case it is the principle of rule of law."
131. See Jean-Gabriel Castel, *The Civil Law System of the Province of Quebec* (Toronto: Butterworths, 1962). See also the Royal Edict of 1663 creating the Conseil Souverain of New France; text in Jacques-Yvan Morin and José Woehrling, *Les Constitutions du Canada et du Québec* (Montreal: Les Éditions Thémis, 1992), p. 592.
132. See W.R. Jackett, "Foundations of Canadian Law in History and Theory", in Otto E. Lang, ed., *Contemporary Problems of Public Law in Canada* (Toronto: University of Toronto Press, 1968); J.E. Cote, "The Reception of English Law" (1977), 15 Alta. L. Rev. 29; and Peter W. Hogg, *Constitutional Law of Canada*, 3rd ed. (Toronto: Carswell, 1992), pp. 27-44.
133. *R. v. Sparrow* (cited in note 105) at 1094.
134. *R. v. Sparrow* at 1101.
135. Amagoalik and Chartier quoted in Michael Asch, *Home and Native Land: Aboriginal Rights and the Canadian Constitution* (Toronto: Methuen, 1984), p. 27, citing *First Ministers' Conference on Aboriginal Constitutional Matters; Unofficial and Unverified Verbatim Transcript*, 15 March 1983, Volume 1, pp. 130 and 134 respectively (with minor corrections in first quotation approved by Amagoalik).
136. Resolution of the Quebec National Assembly, 20 March 1985. The English text is reproduced in Secrétariat aux affaires autochtones, *The Basis of the Québec Government's Policy on Aboriginal Peoples* (Quebec City: 1988). The original French text is found in Secrétariat aux affaires autochtones, *Les fondements de la politique du Gouvernement du Québec en matière autochtone* (Quebec City: 1988), pp. 5-6.
137. The evolution of modern legal thinking on the subject can be traced in the following commentaries: Gerard V. La Forest, *Natural Resources and Public Property Under the Canadian Constitution* (Toronto: University of Toronto Press, 1969), pp. 108-133; Douglas Sanders et al., *Native Rights in Canada* (Toronto: Indian-Eskimo Association of Canada, 1970); Peter A. Cumming and Neil H.



- Mickenberg, ed., *Native Rights in Canada*, 2nd ed. (Toronto: Indian-Eskimo Association of Canada and General Publishing, 1972); Kenneth Lysyk, "The Indian Title Question in Canada: An Appraisal in the Light of Calder" (1973) 51 Can. Bar Rev. 450; Douglas Sanders, "The Nishga Case" (1973) B.C. Studies (no. 19) 3; J.C. Smith, "The Concept of Native Title" (1974) 24 U.T.L.J. 1; Henri Brun, "Les droits des Indiens sur le territoire du Québec", in *Le territoire du Québec: Six études juridiques* (Quebec City: Presses de l'Université Laval, 1974), p. 33; Brian Slattery, "The Land Rights of Indigenous Canadian Peoples", doctoral dissertation, Oxford University, 1979, reprinted by the University of Saskatchewan Native Law Centre, 1979; Geoffrey S. Lester, "The Territorial Rights of the Inuit of the Canadian Northwest Territories: A Legal Argument", doctoral dissertation, Osgoode Hall Law School, York University, 1981; Leroy Littlebear, "A Concept of Native Title" (1982) 5 Can. Legal Aid Bul. (Nos. 2 & 3) 99; Brian Slattery, *Ancestral Lands, Alien Laws: Judicial Perspectives on Aboriginal Title* (Saskatoon: University of Saskatchewan Native Law Centre, 1983); Boldt and Long, ed., *The Quest for Justice* (cited in note 113); René Dussault and Louis Borgeat, *Administrative Law: A Treatise*, 2nd ed. (Toronto: Carswell, 1988), Vol. II, pp. 68-84; Slattery, "Understanding Aboriginal Rights" (cited in note 127); Kent McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989); Kent McNeil, "The Temagami Indian Land Claim: Loosening the Judicial Strait-jacket", in Matt Bray and Ashley Thomson, ed., *Temagami: A Debate on Wilderness* (Toronto: Dundurn Press, 1990), p. 185; Slattery, "First Nations and the Constitution" (cited in note 105); Hogg, *Constitutional Law* (cited in note 132), pp. 679-682; Jack Woodward, *Native Law* (Toronto: Carswell, 1994); and Macklem, "Normative Dimensions of the Right of Aboriginal Self-Government" (cited in note 106).
138. See Slattery, "Understanding Aboriginal Rights" (cited in note 127), pp. 732, 744-745.
139. The following Supreme Court decisions contain important discussions of Aboriginal rights and their relation to treaty rights: *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313; *Guerin v. R.*, [1984] 2 S.C.R. 335; *Simon v. R.*, [1985] 2 S.C.R. 387; *Roberts v. Canada*, [1989] 1 S.C.R. 322; *R. v. Sparrow* (cited in note 105); *R. v. Sioui*, [1990] 1 S.C.R. 1025. The modern Supreme Court has in effect confirmed a view expressed in the nineteenth century by a majority of Supreme Court justices in *St. Catharines Milling and Lumber Company v. R.* (1887), 13 S.C.R. 577, a view that was overshadowed at the time by the ambiguous views of the British Privy Council on further appeal, as reported in (1888), 14 Appeal Cases 46. In *St. Catharines* (1887), the Supreme Court was split four-two on the question of which government, federal or provincial, took the benefit of a cession of Indian lands, with the majority (Ritchie C.J., Fournier, Henry and Taschereau JJ.) favouring the provincial government and a minority (Strong and Gwynne JJ.) supporting the federal government. However, on the question of the existence of Aboriginal title, the Court split in a different manner, with four judges (Ritchie, C.J., Fournier, Strong and Gwynne JJ.) supporting the view that Aboriginal land rights existed in one form or another under Canadian law, and two

judges (Henry and Taschereau JJ.) apparently denying this; see especially at 599-600, 608-616, 638, 639, 643-645, 663-664. For recent judicial treatments of the doctrine of Aboriginal rights, see the judgement of the British Columbia Court of Appeal in *Delgamuukw v. British Columbia* (cited in note 127), and the judgement of the High Court of Australia in *Mabo v. Queensland* (1992), 107 Australian Law Reports 1.

140. *Calder v. Attorney-General of British Columbia*, at p. 328.
141. See *Roberts v. Canada* (cited in note 139) at 340, where Justice Wilson identified the precise question to be resolved in the case as "whether the law of aboriginal title is federal common law". To this question she responded: "I believe that it is. In *Calder v. Attorney-General of British Columbia*, this Court recognized aboriginal title as a legal right derived from the Indians' historic occupation and possession of their tribal lands. As Dickson J....pointed out in *Guerin*, aboriginal title pre-dated colonization by the British and survived British claims of sovereignty." For discussion of this holding, see John M. Evans and Brian Slattery on *Roberts v. Canada* in "Notes of Cases" (1989) 68 Can. Bar Rev. 817 at 829-832. See also *Bisaillon v. Keable*, [1983] 2 S.C.R. 60, where the Supreme Court of Canada held that common law rules that fall within the jurisdiction of the federal Parliament are paramount to provincial laws. Justice Beetz stated for the Court at 108: "I do not see why the federal Parliament is under an obligation to codify legal rules if it wishes to ensure that they have paramountcy over provincial laws, at least when some of those legal rules fall under its exclusive jurisdiction".
142. On this broad usage, see *Black's Law Dictionary*, 5th ed. (St. Paul, Minn.: West Publishing Co., 1979), pp. 250-251.
143. *St. Catharines Milling and Lumber Company* (cited in note 139) at 612-613. See also his statement at pp. 615-616: "To summarize these arguments, which appear to me to possess great force, we find, that at the date of confederation the Indians, by the constant usage and practice of the Crown, were considered to possess a certain proprietary interest in the unsundered lands which they occupied as hunting grounds; that this usage had either ripened into a rule of the common law as applicable to the American Colonies, or that such a rule had been derived from the law of nations and had in this way been imported into the Colonial law as applied to Indian Nations".
144. *R. v. Sioui* (cited in note 139) at 1054-1055.
145. *Re The Regulation and Control of Aeronautics in Canada*, [1932] Appeal Cases 54 at 70 (Privy Council), rev'g [1930] S.C.R. 663.
146. These remarks are sometimes associated with various 'compact theories' of Confederation. For discussion of compact theories, see, for example, Morin and Woehrling, *Les Constitutions du Canada et du Québec* (cited in note 131), pp. 153-164; and G.F.G. Stanley, "Act or Pact? Another Look at Confederation", in Ramsay Cook, Craig Brown and Carl Berger, ed., *Canadian Historical Readings* (Toronto: University of Toronto Press, 1967), pp. 94-118. For the application of a compact

- theory to Aboriginal peoples, see J.E. Foster, "Indian-White Relations in the Prairie West during the Fur Trade Period – A Compact?", in Richard Price, ed., *The Spirit of the Alberta Indian Treaties* (Montreal: Institute for Research on Public Policy, 1979), pp. 181-200, and the wide-ranging discussion in James Tully, "Multirow Federalism and the Charter", in Philip Bryden, Steven Davis, and John Russell, ed., *Protecting Rights and Freedoms: Essays on the Charter's Place in Canada's Political, Legal, and Intellectual Life* (Toronto: University of Toronto Press, 1994).
147. Thomas-Jean-Jacques Loranger, *Lettres sur l'interprétation de la constitution fédérale; première lettre* (Quebec City: Imprimerie A. Côté et Cie., 1883), pp. 59-60; translated as *Letters upon the Interpretation of the Federal Constitution; First Letter* (Quebec: Morning Chronicle Office, 1884), pp. 61-62. For Loranger's influence, see "Loranger, Thomas-Jean-Jacques" in *Dictionary of Canadian Biography* (cited in note 119), Volume 11, pp. 529-531.
  148. For the application of this principle in the context of indigenous property rights, see *Amodu Tijani v. Secretary, Southern Nigeria*, [1921] 2 Appeal Cases 399 (Privy Council) at 407-410; *Oyekan v. Adele*, [1957] 2 All England Law Reports 785 (Privy Council) at 788; *Calderv. Attorney-General of British Columbia* (cited in note 139) at 401-406; *Guerin v. R.* (cited in note 139) at 376-379; Slattery, *Land Rights* (cited in note 137), pp. 49-62; Slattery, *Ancestral Lands* (cited in note 137); and McNeil, *Common Law Aboriginal Title* (cited in note 137), especially pp. 161-192. For contrasting viewpoints on the doctrine of continuity, see *Delgamuukw v. British Columbia* (cited in note 127) at 98-99 and at 165-168.
  149. *Letters upon the Interpretation of the Federal Constitution* (cited in note 147), pp. 14-15.
  150. The full reciprocal texts of the treaty, which are found in the British Public Record Office, are reproduced in the documentary submissions made by the defendants in the *Nova Scotia Micmac Moose Harvest Cases*, Document Books, Volume 1; for the outcome of the cases, see [1990] 3 C.N.L.R. 87. For discussion of the status of the eighteenth-century Maritime treaties, see the decision of the Supreme Court of Canada in *Simon v. R.* (cited in note 139).
  151. Treaty of Peace signed on 25 June 1761, reproduced in the *Moose Harvest Cases*, Volume 3, pp. 553-618; the passage quoted is on p. 573.
  152. *R. v. Sioui* (cited in note 139) at 1034.
  153. *R. v. Sioui* at 1071-1073.
  154. For a full discussion of the Proclamation see Volume 1, Chapter 5. For the complete text of the Royal Proclamation see Volume 1, Appendix D.
  155. Statutes at Large (U.K.) 8, 7 George III to 18 George III, c. 83.
  156. Statutes at Large, s. 8: "All His Majesty's *Canadian* Subjects within the Province of *Quebec*...may also hold and enjoy their Property and Possessions, together with all Customs and Usages relative thereto, and all other their Civil Rights, in as large,

ample, and beneficial Manner, as if the said Proclamation, Commissions, Ordinances, and other Acts and Instruments had not been made...and that in all Matters of Controversy, relative to Property and Civil Rights, Resort shall be had to the Laws of *Canada*, as the Rule for the Decision of the same”.

157. See M.B. Hooker, *Legal Pluralism: An Introduction to Colonial and Neo-Colonial Laws* (Oxford: Oxford University Press, 1975); and Kenneth Roberts-Wray, *Commonwealth and Colonial Law* (New York: Frederick A. Praeger, Inc., 1966).
158. Section 3 of the *Quebec Act* states in full: “Provided always, and be it enacted, That nothing in this Act contained shall extend, or be construed to extend, to make void, or to vary or alter any Right, Title, or Possession, derived under any Grant, Conveyance, or otherwise howsoever, of or to any Lands within the said Province, or the Provinces thereto adjoining; but that the same shall remain and be in force, and have Effect, as if this Act had never been made.”
159. To this effect, see *St. Catharines Milling and Lumber Company v. R.* (cited in note 139) at 629-635 and at 648. Justice Strong stated at 631-632: “The words ‘right’, ‘title’ and ‘possession’ [in section 3 of the *Quebec Act*] are all applicable to the rights which the Crown had conceded to the Indians by the proclamation [of 1763], and, without absolutely disregarding this 3rd section, it would be impossible to hold that these vested rights of property or possession had all been abolished and swept away by the statute. I must therefore hold, that the Quebec act had no more effect in revoking the five concluding paragraphs of the proclamation of 1763 which relate to the Indians and their rights to possess and enjoy their lands until they voluntarily surrendered or ceded them to the Crown, than it had in repealing it as a royal ordinance for the government of the Floridas and Granada” at pp. 631-652. Justice Taschereau stated at 648: “From this result of my interpretation of it [the *Royal Proclamation of 1763*] it is unnecessary, for my determination of this case, to consider how far the sections of the proclamation to which I have alluded, have been affected by the act of 1774. I may, nevertheless, remark, that any right the Indians might have previously had could not, it seems, have been affected by this act, as by its 3rd section it is specially provided and enacted that ‘nothing in this act contained shall extend, or be construed to extend, to make void, or to vary, or alter, any right, title, or possession derived under any grant, conveyance, or otherwise howsoever, of or to any lands within the said Province, or the Provinces thereto adjoining’[note omitted]”. This viewpoint was adopted by the Privy Council on further appeal, see *St. Catherine’s Milling and Lumber Company v. R.* (cited in note 139), where Lord Watson recited the main provisions of the *Royal Proclamation of 1763* and concluded at 54: “The territory in dispute had been in Indian occupation from the date of the proclamation until 1873. During that interval of time Indian affairs have been administered successively by the Crown, by the Provincial Governments, and (since the passing of the British North America Act, 1867), by the Government of the Dominion....Whilst there have been changes in the administrative authority, there has been no change since the year 1763 in the character of the interest which its Indian inhabitants had in the lands surrendered by the treaty. Their possession, such as it was, can only be ascribed to the general provi-



sions made by the royal proclamation in favour of all Indian tribes then living under the sovereignty and protection of the British Crown." See also *R. v. Lady McMaster* [1926] Ex. C.R. 68 at 73-74, where Justice Maclean, after summarizing Lord Watson's opinion on this point in the *St. Catherine's* case, stated: "I am unable also to concur in the defendant's contention that the Quebec Act, which enlarged the limits of the province of Quebec, destroyed the rights of the Indians in the lands reserved under the proclamation. This I think has been authoritatively settled." In *Ontario (A.G.) v. Bear Island Foundation*, [1989] 2 C.N.L.R. 73 at p. 85, the Ontario Court of Appeal held that Aboriginal land rights held under the *Royal Proclamation of 1763* were not affected by the *Quebec Act* but that the Proclamation's procedural requirements governing Indian land cessions were repealed by the act. For discussion, see Slattery, *Land Rights* (cited in note 137), p. 334; and Cumming and Mickenberg, *Native Rights in Canada* (cited in note 137), pp. 71-72, 88-89, 107.

160. *Constitution Act, 1867*, s. 94. The section states that any federal provision for uniformity of laws shall take effect in a province only upon being adopted by the province's legislature.
161. S.C., 1870, c. 3. Section 31 provides in part: "And whereas, it is expedient, towards the extinguishment of the Indian Title to the lands in the Province, to appropriate a portion of such ungranted lands, to the extent of one million four hundred thousand acres thereof, for the benefit of the families of the half-breed residents, it is hereby enacted, that, under regulations to be from time to time made by the Governor General in Council, the Lieutenant-Governor shall select such lots or tracts in such parts of the Province as he may deem expedient, to the extent aforesaid, and divide the same among the children of the half-breed heads of families residing in the Province at the time of the said transfer to Canada."
162. Paul L.A.H. Chartrand, *Manitoba's Métis Settlement Scheme of 1870* (Saskatoon: University of Saskatchewan Native Law Centre, 1991), p. 5 [notes omitted]; see also the detailed analysis at pp. 13-14 and 110-137.
163. Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories* (Toronto: Belfords, Clarke & Co., 1880), p. 213. See discussion in Foster, "Indian-White Relations" (cited in note 146).
164. Morris, *Treaties of Canada*, p. 96.
165. 43 D.L.R. (2d) 150 (Northwest Territories Court of Appeal). The Court's decision was upheld on further appeal to the Supreme Court of Canada: see *Sikyey v. R.* (1964), 50 D.L.R. (2d) 80 at 158.
166. For commentary on section 35 (and the companion section 25), see W.I.C. Binnie, "The Sparrow Doctrine: Beginning of the End or End of the Beginning?" (1990) 15 Queen's L.J. 217; Dussault and Borgeat, *Administrative Law: A Treatise*, 2nd ed., (cited in note 137), Volume 2, pp. 72-73; Georges Emery, "Réflexions sur le sens et la portée au Québec des articles 25, 35, et 37 de la *Loi constitutionnelle de 1982*" (1984) 25 C. de D. 145; Hogg, *Constitutional Law of Canada*, 3rd ed. (cited in note

- 132), pp. 679-695; Lyon, "An Essay on Constitutional Interpretation" (cited in note 168); Kenneth Lysyk, "The Rights and Freedoms of the Aboriginal Peoples of Canada", in Walter S. Tarnopolsky and G  rald-A. Beaudoin, ed., *The Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1982); Kent McNeil, "The Constitutional Rights of the Aboriginal Peoples of Canada" (1982) 4 Supreme Court L.R. 255; Kent McNeil, "The *Constitution Act, 1982*, Sections 25 and 35" (1988) 1 C.N.L.R. 1; James O'Reilly, "La *Loi constitutionnelle de 1982*, droit des autochtones" (1984) 25 C. de D. 125; William Pentney, "The Rights of the Aboriginal Peoples of Canada and the *Constitution Act, 1982*. Parts I and II" (1988) 22 U.B.C. L. Rev. 21, 207; Douglas Sanders, "The Rights of Aboriginal Peoples of Canada" (1983) 61 Can. Bar Rev. 314; Douglas Sanders, "Pre-Existing Rights: The Aboriginal Peoples of Canada (Sections 25 and 35)", in G  rald-A. Beaudoin and Edward Ratushny, ed., *The Canadian Charter of Rights and Freedoms*, 2nd ed. (Toronto: Carswell, 1989), 707; Bryan Schwartz, *First Principles, Second Thoughts: Aboriginal Peoples, Constitutional Reform and Canadian Statecraft* (Montreal: Institute for Research on Public Policy, 1986); Brian Slattery, "The Constitutional Guarantee of Aboriginal and Treaty Rights" (1982-83) 8 Queen's L.J. 232; Brian Slattery, "The Hidden Constitution: Aboriginal Rights in Canada" (1984) 32 Am. J. Comp. L. 361; Slattery, "Understanding Aboriginal Rights" (cited in note 127); Brian Slattery, "Aboriginal Language Rights", in David Schneiderman, ed., *Language and the State* (Cowansville, Quebec: Les   ditions Yvon Blais Inc., 1991), 369; Slattery, "First Nations and the Constitution", (cited in note 105); and Bruce H. Wildsmith, *Aboriginal Peoples and Section 25 of the Canadian Charter of Rights and Freedoms* (Saskatoon: University of Saskatchewan Native Law Centre, 1988).
167. *R. v. Sparrow* (cited in note 105) at 1105. The unanimous judgement was written jointly by Chief Justice Dickson and Justice La Forest.
168. *Sparrow* at 1106. The passage quoted is found in Noel Lyon, "An Essay on Constitutional Interpretation" (1988) 26 Osgoode Hall L.J. 95 at 100.
169. *Sparrow* at 1106.
170. *Sparrow* at 1108.
171. *Sparrow* at 1099.
172. As the Court remarked in *Sparrow* at 1095: "It is true that for the period from 1867 to 1961 the evidence is scanty. But the evidence was not disputed or contradicted in the courts below and there is evidence of sufficient continuity of the right to support the Court of Appeal's finding, and we would not disturb it."
173. The Court stated in *Sparrow* at 1101: "Government regulations governing the exercise of the Musqueam right to fish...have only recognized the right to fish *for food* for over a hundred years. This may have reflected the existing position. However, historical policy on the part of the Crown is...incapable of, in itself, delineating that right. The nature of government regulations cannot be determinative of the content and scope of an existing aboriginal right."

174. The Court held in *Sparrow* at 1091: "The word 'existing' makes it clear that the rights to which section 35(1) applies are those that were in existence when the *Constitution Act, 1982* came into effect. This means that extinguished rights are not revived by the *Constitution Act, 1982*."
175. *Sparrow* at 1099.
176. *Baker Lake (Hamlet) v. Minister of Indian Affairs and Northern Development*, [1980] 1 F.C. 518 (Trial Division) at 568.
177. The Court stated at 1097-1098: "At bottom, the respondent's argument confuses regulation with extinguishment. That the right is controlled in great detail by the regulations does not mean that the right is thereby extinguished." It went on to conclude at p. 1099: "There is nothing in the *Fisheries Act* or its detailed regulations that demonstrates a clear and plain intention to extinguish the Indian aboriginal right to fish. The fact that express provision permitting the Indians to fish for food may have applied to all Indians and that for an extended period permits were discretionary and issued on an individual rather than a communal basis in no way shows a clear intention to extinguish. These permits were simply a manner of controlling the fisheries, not defining underlying rights."
178. In *R. v. Sparrow* (cited in note 105) the Court observed at 1091: "An existing aboriginal right cannot be read so as to incorporate the specific manner in which it was regulated before 1982. The notion of freezing existing rights would incorporate into the Constitution a crazy patchwork of regulations."
179. *R. v. Sparrow* at 1093, quoting Slattery, "Understanding Aboriginal Rights" (cited in note 127), p. 782.
180. *Sparrow* at 1099.
181. *Sparrow* at 1110 [emphasis added].
182. There is a growing body of legal literature dealing with the inherent right of self-government. See Asch, *Home and Native Land* (cited in note 135); Michael Asch, "Aboriginal Self-Government and the Construction of Canadian Constitutional Identity" (1992) 30 Alta. L. Rev. 465; Michael Asch and Patrick Macklem, "Aboriginal Rights and Canadian Sovereignty: An Essay on *R. v. Sparrow*" (1991) 29 Alta. L. Rev. 498; John J. Borrows, "A Genealogy of Law: Inherent Sovereignty and First Nations Self-Government" (1992) 30 Osgoode Hall L.J. 291; John Borrows, "Constitutional Law from a First Nation Perspective: Self-Government and the Royal Proclamation" (1994) 28 U.B.C. L. Rev. 1; Frank Cassidy, ed., *Aboriginal Self-Determination* (Halifax: Institute for Research on Public Policy, 1991); Frank Cassidy and Robert L. Bish, *Indian Government: Its Meaning in Practice* (Halifax: Institute for Research on Public Policy, 1989); Diana Edith Ginn, "Aboriginal Self-Government", LL.M. dissertation, Osgoode Hall Law School, York University, 1987; David C. Hawkes, *Aboriginal Self-Government: What Does It Mean?* (Kingston, Ont.: Institute of Intergovernmental Relations, Queen's University, 1985); Kenneth J. Maddock, Bruce W. Hodgins and John S. Milloy, "Aboriginal Self-Government": Another Level or Order in Canadian and Australian

Federalism?"; in Bruce W. Hodgins et al., ed., *Federalism in Canada and Australia: Historical Perspectives, 1920-1988* (Peterborough, Ont.: Frost Centre, Trent University, 1989), 452; John D. Hurley, *Children or Brethren: Aboriginal Rights in Colonial Iroquoia*, doctoral dissertation, Cambridge University, 1985 (reprinted by the University of Saskatchewan Native Law Centre, 1985); Peter W. Hutchins, "The Aboriginal Right to Self-Government and the Canadian Constitution: The Ghost in the Machine", in *The Inherent Right of Aboriginal Self-Government* (cited in note 118), Volume 1; Thomas Isaac, "The Storm over Aboriginal Self-Government: Section 35 of the *Constitution Act, 1982* and the Redefinition of the Inherent Right of Aboriginal Self-Government" (1992) 2 C.N.L.R. 6; Darlene M. Johnston, "The Quest of the Six Nations Confederacy for Self-Determination" (1986) 44 U.T. Fac. L. Rev.; Randy Kapashesit and Murray Klippenstein, "Aboriginal Group Rights and Environmental Protection" (1991) 36 McGill L.J. 925; Leroy Little Bear, Menno Boldt, and J. Anthony Long, ed., *Pathways to Self-Determination: Canadian Indians and the Canadian State* (Toronto: University of Toronto Press, 1984); Patrick Macklem, "First Nations Self-Government and the Borders of the Canadian Legal Imagination" (1991) 36 McGill L.J. 382; Macklem, "Distributing Sovereignty: Indian Nations and Equality of Peoples" (cited in note 113); Macklem, "Normative Dimensions of the Right of Aboriginal Self-Government" (cited in note 106); Kent McNeil, "Envisaging Constitutional Space for Aboriginal Governments" (1993) 19 Queen's L.J. 95; Kent McNeil, "The Decolonization of Canada: Moving Toward Recognition of Aboriginal Governments" (1994) 7 Western Legal History 113; Shaun Nakatsuru, "A Constitutional Right of Indian Self-Government" (1985) 43 U.T. Fac. L. Rev. 72; Delia Opekokew, "The Inherent Right of Self-Government as an Aboriginal and Treaty Right", in *The Inherent Right of Aboriginal Self-Government* (cited in note 118), Volume 1; Alan Pratt, "Aboriginal Self-Government and the Crown's Fiduciary Duty: Squaring the Circle or Completing the Circle?" (1992-1993) 2 N.J.C.L. 163; Bruce Ryder, "The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations" (1991) 36 McGill L.J. 308; Douglas Sanders, *Aboriginal Self-Government in the United States* (Kingston, Ont.: Institute of Intergovernmental Relations, Queen's University, 1985); Slattery, "First Nations and the Constitution" (cited in note 105); Brian Slattery, "Aboriginal Sovereignty and Imperial Claims" (1991) 29 Osgoode Hall L.J. 681; Paul Williams, "The Chain", LL.M. dissertation, Osgoode Hall Law School, York University, Toronto, 1982; John D. Whyte, "Indian Self-Government: A Legal Analysis", in Little Bear et al., *Pathways to Self-Determination* (cited earlier in this note); Woodward, *Native Law* (cited in note 137), pp. 81-83; Hogg and Turpel, "Implementing Aboriginal Self-Government" (cited in note 86).

183. See Brian Slattery, "Aboriginal Peoples and the Crown", research study prepared for RCAP (1993).
184. Special Committee on Indian Self-Government, *Indian Self-Government in Canada: [Second] Report of the Special Committee*, presented to the House of Commons, 12 and 20 October 1983, p. 43.



185. *Indian Self-Government*, p. 44.
186. *Indian Self-Government*, p. 44.
187. For discussion of these negotiations, see Asch, *Home and Native Land* (cited in note 135); William Calder, "The Provinces and Indian Self-Government in the Constitutional Forum", in J. Anthony Long and Menno Boldt, ed. *Governments in Conflict? Provinces and Indian Nations in Canada* (Toronto: University of Toronto Press, 1988), pp. 72-82; J. Edward Chamberlain, "Aboriginal Rights and the Meech Lake Accord", in Katherine E. Swinton and Carol J. Rogerson, *Competing Constitutional Visions: The Meech Lake Accord* (Toronto: Carswell, 1988), pp. 11-19; Georges Erasmus, "Twenty Years of Disappointed Hopes", in Boyce Richardson, ed., *Drumbeat: Anger and Renewal in Indian Country* (Toronto: Summerhill Press Ltd., 1990), pp. 1-42; R.E. Gaffney, G.P. Gould, and A.J. Semple, *Broken Promises: The Aboriginal Constitutional Conferences* (Fredericton: New Brunswick Association of Metis and Non-Status Indians, 1984); David C. Hawkes, *Aboriginal Peoples and Constitutional Reform: What Have We Learned?* (Kingston: Institute of Intergovernmental Relations, Queen's University, 1989); McNeil, "The Decolonization of Canada" (cited in note 137); Schwartz, *First Principles, Second Thoughts* (cited in note 166); and Norman K. Zlotkin, "The 1983 and 1984 Constitutional Conferences: Only the Beginning" (1984) 3 C.N.L.R. 3-29.
188. See First Ministers Meeting on the Constitution, *Consensus Report on the Constitution*, Charlottetown, P.E.I., 28 August 1992, and *Draft Legal Text*, 9 October 1992.
189. Minister of Indian Affairs and Northern Development, *Aboriginal Self-Government: The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government* (Ottawa: Public Works and Government Services, 1995), p. 3.
190. See *Delgamuukw v. British Columbia* (cited in note 127) per Macfarlane J. and Wallace J., with dissenting opinions per Lambert J. and Hutcheon J. See also *Casimel v. Insurance Corporation of British Columbia* (cited in note 127); and *R. v. Pamajewon and Jones*, [1995] 2 C.N.L.R. 188 (Ont. C.A.). For commentary, see Freedman, "The Space for Aboriginal Self-Government" (cited in note 118); and Hutchins, "The Aboriginal Right to Self-Government" (cited in note 182).
191. Dicey, *Law of the Constitution* (London: MacMillan & Co., 1959), pp. 39-40 [note omitted], as quoted in *Delgamuukw v. British Columbia* at 120.
192. *R. v. Sparrow* (cited in note 105) at 1103.
193. We are speaking here of the situation existing before the enactment of section 35 of the *Constitution Act, 1982*, which curtailed the powers of Parliament.
194. *Province of Ontario v. Dominion of Canada*, [1912] A.C. 571, at 581. The judgement of the Court was delivered by Earl Loreburn.

195. See discussion and references in Roberts-Wray, *Commonwealth and Colonial Law* (cited in note 157).
196. See W.P.M. Kennedy, *Statutes, Treaties and Documents of the Canadian Constitution, 1713-1929*, 2nd ed. (Toronto: Oxford University Press, 1930), p. 7.
197. See the text of the Royal Proclamation in Volume 1, Appendix D, and our discussion in Volume 1, Chapter 3.
198. *Constitutional Act, 1791* (U.K.) 31 Geo. III, c. 31, s. 2; text in Kennedy, *Statutes, Treaties and Documents* (cited in note 196).
199. *Union Act, 1840* (U.K.) 3 & 4 Vict., c. 35, s. 3; text in Kennedy, *Statutes, Treaties and Documents*, pp. 433-434.
200. *R. v. Secretary of State for Foreign and Commonwealth Affairs, ex parte Indian Association of Alberta*, [1982] 2 All Eng. L. R. 118 at 125.
201. *An Act Respecting the Management of the Indian Lands and Property*, S. Prov. C., 1860, c. 151.
202. *An Act Providing for the Organisation of the Department of the Secretary of State of Canada, and for the Management of Indian and Ordinance Lands*, S.C. 1868, 31 Vict., c. 42.
203. Compare section 51 of the *Indian Act*, R.S.C. 1927, c. 98, with section 39 of the *Indian Act*, S.C. 1951, c. 29.
204. For discussion, see Richard H. Bartlett, *The Indian Act of Canada*, 2nd ed. (Saskatoon: University of Saskatchewan Native Law Centre, 1988).
205. *An Act for the Gradual Enfranchisement of Indians, the Better Management of Indian Affairs, and to Extend the Provisions of the Act, 31st Victoria, Chapter 42*, S.C. 1869, 32-33 Vict., c. 6. See also John Giokas, "The *Indian Act*: Evolution, Overview and Options for Amendment and Transition", research study prepared for RCAP (1995).
206. Rosie Mosquito and Konrad Sioui, *To the Source: First Nations Circle on the Constitution. Commissioners' Report* (Ottawa: Assembly of First Nations, 1992), p. 21.
207. For a parallel approach, see Slattery, "First Nations and the Constitution" (cited in note 105) at pp. 282-287. For a different view, see Kent McNeil, "Envisaging Constitutional Space for Aboriginal Governments" (1993) 19 *Queen's L.J.* 95.
208. In *Re Term "Indians"*, [1939] S.C.R. 104, the Supreme Court of Canada ruled that section 91(24) applied to the Inuit (or "Eskimo") peoples. The Supreme Court has not yet decided whether the section also covers Métis people. A leading constitutional authority, Peter Hogg, offers the view that Métis people are probably included within the section; see Hogg, *Constitutional Law of Canada*, 3rd ed. (cited in note 132). For background and discussion, see Catherine Bell, "Who Are The Metis People in Section 35(2)?" (1991) 29 *Alta. L. Rev.*; Clem Chartier, "Indian: An Analysis of the Term as Used in Section 91(24) of the *B.N.A. Act*" (1978-79) 43 *Sask. Law Rev.*; Paul L.A.H. Chartrand, "Aboriginal Rights: The

- Dispossession of the Métis" (1991) 29 Osgoode Hall L.J. 457; Chartrand, *Manitoba's Métis Settlement Scheme* (cited in note 162); Richard I. Hardy, "Metis Rights in the Mackenzie River District of the Northwest Territories" (1980) 1 C.N.L.R. 1; Cumming and Mickenberg, *Native Rights in Canada* (cited in note 137), pp. 6-9, 200-204; William F. Pentney, *The Aboriginal Rights Provisions in the Constitution Act, 1982* (Saskatoon: University of Saskatchewan Native Law Centre, 1987), chapter 4; Schwartz, *First Principles, Second Thoughts* (cited in note 166) pp. 213-247; and Woodward, *Native Law* (cited in note 137), pp. 53-59.
209. Slattery, "First Nations and the Constitution" (cited in note 105), p. 282, quoting *R. v. Sparrow* (cited in note 105), p. 1109, where the Supreme Court stated: "We find that the words 'recognition and affirmation' [in s. 35(1)] incorporate the fiduciary relationship referred to earlier and so import some restraint on the exercise of sovereign power. Rights that are recognized and affirmed are not absolute. Federal legislative powers continue, including, of course, the right to legislate with respect to Indians pursuant to s. 91(24) of the *Constitution Act, 1867*. These powers must, however, now be read together with s. 35(1)."
210. See *Sparrow* at 1113-1114. The Supreme Court held that the alternative proposed justifications of reasonableness and "in the public interest" were not sufficiently stringent; see pp. 1113, 1118-1119.
211. For discussion of these principles, see, for example, Hogg, *Constitutional Law of Canada* (cited in note 132), and Slattery, "Understanding Aboriginal Rights" (cited in note 127).
212. See, respectively, *Four B Manufacturing Limited v. United Garment Workers*, [1980] 1 R.C.S. 1031; *R. v. Hill* (1907), 15 O.L.R. 406 (Ont. C.A.); and *R. v. Francis*, [1988] 1 S.C.R. 1025.
213. As discussed earlier (see note 105), it has not yet been decided whether the *Sparrow* exception applies to provincial laws.
214. Parliament holds the general power to regulate both coastal and inland fisheries under section 91(12), *Constitution Act, 1867*. For discussion, see Hogg, *Constitutional Law of Canada* (cited in note 132), pp. 723-727.
215. *Draft Legal Text* (cited in note 188), 9 October 1992, s. 29.
216. *The Dismantling of the Department of Indian Affairs and Northern Development, the Restoration of Jurisdictions to First Nations Peoples in Manitoba and Recognition of First Nations Governments in Manitoba, Framework Agreement*, 7 December 1994.
217. Thus, the Manitoba heading 'citizenship' is implicit in the Charlottetown heading 'identities', and the Charlottetown heading 'environment' seems to be covered by the Manitoba heading 'lands, waters'.
218. Minister of Indian Affairs and Northern Development, *Aboriginal Self-Government* (Ottawa: Public Works and Government Services Canada, 1995).
219. *International Bill of Human Rights* (Universal Declaration of Human Rights) (New York: United Nations, 1978; reprinted Ottawa: Supply and Services, 1980), Article 19.

220. See, generally, Kent McNeil, "Aboriginal Governments and the Canadian Charter of Rights and Freedoms: A Legal Perspective", research study prepared for RCAP (1994).
221. Hogg and Turpel, "Implementing Aboriginal Self-Government" (cited in note 86).
222. See also Slattery, "First Nations and the Constitution" (cited in note 105).
223. Hogg and Turpel, "Implementing Aboriginal Self-Government", (cited in note 86), p. 418.
224. Hogg and Turpel, pp. 418-419.
225. In any case, under section 33(1), notwithstanding clauses may only be passed with respect to section 2 and sections 7 to 15 of the Charter.
226. See Hogg and Turpel, "Implementing Aboriginal Self-Government" (cited in note 86), p. 414 and following.
227. For a critique of dual citizenship, see the report of the House of Commons Standing Committee on Citizenship and Immigration, "Canadian Citizenship: A Sense of Belonging", Issue No. 23, June 1994.
228. Lamothe, "A Historical View of Treaty 11" (cited in note 20), pp. 58-59.
229. See *R. v. Secretary of State* (cited in note 200).
230. For a discussion, see Thomas Isaac, "The Concept of the Crown and Aboriginal Self-Government" (1994) 14 *Canadian Journal of Native Studies* 221.
231. Donald A. Grinde Jr. and Bruce E. Johansen, *Exemplar of Liberty: Native America and the Evolution of Democracy* (Los Angeles: University of California American Indian Studies Center, 1991), p. 29. Grinde and Johansen describe the three basic principles as follows: "The first law of nature was that a stable mind and healthy body must be in balance so that peace between individuals and groups could occur. Secondly, ...humane conduct, thought, and speech were requirements for equity and justice among peoples. Finally, he divined a society in which physical strength and civil authority would reinforce the power of the clan system" (pp. 28-29). See also Paul A.W. Wallace, *The Iroquois Book of Life: White Roots of Peace* (Philadelphia: University of Pennsylvania Press, 1946; Santa Fe, New Mexico: Clear Light Publishers, 1994), pp. 7-8, 30-31, 41.
232. We use the term 'Aboriginal public government' to mean leadership and control of a government by Aboriginal people in regions or territories where they constitute a majority of residents. An Aboriginal-controlled government will have many features not found in governments controlled by non-Aboriginal people.
233. A more detailed discussion of the Commission's proposed land regime as it pertains to categories of land is found in Chapter 4 (in Part Two of this volume). Three categories of land are identified and discussed. Category I lands are subject to full Aboriginal ownership and sole Aboriginal stewardship. Category II lands encompass parts of the nation's traditional territories and are subject to Aboriginal and Crown rights to be specified in agreements. Governance and jurisdiction on



- Category II lands would be shared by the agreement partners. Category III lands include Crown and private lands that sustain a complete set of Crown rights in land and governance, although some Aboriginal rights may be recognized, especially concerning spiritual and historical relationships with the land.
234. Judicial structures and processes in matters of criminal law are the subject of more detailed investigation and recommendations in RCAP, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (Ottawa: Supply and Services, 1996).
  235. The *Nunavut Act* (cited in note 78) assigns the Nunavut government legislative authority for municipal and local institutions in Nunavut.
  236. An example of government based on subsidiarity is the European Union.
  237. See RCAP, *Bridging the Cultural Divide* (cited in note 234), especially the discussion of Aboriginal Legal Services of Toronto in Chapter 3.
  238. These principles are drawn, in part, from the general academic literature on public finance and fiscal federalism. See Vicky Barham and Robin Boadway, "Financing Aboriginal Self-Government", research study prepared for RCAP (1995).
  239. The exception is property taxes for separate schools in Ontario and in certain areas of Quebec which are levied on the basis of residency and religion.
  240. The subsidies contained an element of equalization, in that they were per capita grants up to a maximum population. For an overview of equalization in Canada, see Thomas J. Courchene, "Equalization Payments and the Division of Powers", in Thomas J. Courchene, *Economic Management and the Division of Powers*, Volume 67 of *The Collected Research Studies (Royal Commission on the Economic Union and Development Prospects for Canada)* (Toronto: University of Toronto Press, 1986).
  241. *Report of the Royal Commission on the Economic Union and Development Prospects for Canada*, Volume 3 (Ottawa: Supply and Services, 1985).
  242. Section 119 of the *Constitution Act, 1867*.
  243. *Constitution Amendment Proclamation, 1993 (Prince Edward Island)*.
  244. Status Indian people living on-reserve and whose income is earned from activity on-reserve are the only individuals whose personal income is sheltered from taxation. All other Aboriginal people pay personal income taxes in the same manner as other Canadians. Purchases made by status Indian people on-reserve are free of federal and provincial sales tax. In some provinces, purchases made off-reserve are free of provincial sales tax with proof that the buyer is a status Indian person. Federal sales tax on goods purchased off-reserve is waived for status Indian people when the goods purchased are to be delivered to the reserve.
  245. Tax exemption is referred to in the text of at least one of the historical treaties and was the subject of oral exchanges during the negotiation of others. In Chapter 2

of this volume we propose that issues of taxation be clarified in the treaty renewal and treaty-making processes.

246. This point was made forcefully presented to the Commission during its public hearings in Merritt, B.C. on 5 November 1992. The brief of the Musqueam/Salish Parks Residents' Association, submitted to RCAP on 5 October 1992 in Vancouver, states on p. 7:

*The non-native leaseholders on Reserve land have been disenfranchised. We are taxed without representation!* Needless to say, we do not elect members of the Band Council nor can we be elected to the Band Council. We believe that the principle of no taxation without representation is fundamental in a democratic system of government. [emphasis in original]

247. *Sechelt Indian Government District Enabling Act*, S.B.C. 1987, c. 16; see also John P. Taylor and Gary Paget, "Federal/Provincial Responsibility and the Sechelt", in David C. Hawkes, ed., *Aboriginal Peoples and Government Responsibility: Exploring Federal and Provincial Roles* (Ottawa: Carleton University Press, 1989).
248. Established Programs Financing and the Canada Assistance Plan have been replaced by a single, unconditional block-funding arrangement called the Canada Health and Social Transfer (CHST). See the *Budget Implementation Act*, S.C. 1995, chapter 17, section V.
249. For further information, see *Report of the Royal Commission on the Economic Union and Development Prospects for Canada*, Volume 3 (cited in note 241).
250. The recommendations of the Rowell-Sirois Commission first proposed that a series of national adjustment grants be instituted, incorporating the expenditure or fiscal needs of the provinces. See Royal Commission on Dominion-Provincial Relations, *Report of the Royal Commission on Dominion-Provincial Relations, Book II: Recommendations* (Ottawa: Queen's Printer, 1940), pp. 125-130.
251. However, the federal government's payments under the Canada Assistance Plan were later capped for the 'have' provinces: Ontario, British Columbia and Alberta.
252. The proportion of total revenues that takes the form of federal government grants varies considerably from province to province. British Columbia receives only about 11 per cent of its revenues in this form, as compared with 44 per cent received by Newfoundland (1992-1993 data). These data are found in Robin Boadway and Frank Flatters, "Fiscal Federalism: Is the System in Crisis?", in Keith G. Banting, Douglas M. Brown and Thomas J. Courchene, ed., *The Future of Fiscal Federalism* (Kingston: Queen's University School of Policy Studies, 1994).
253. In specific claims settlements, compensation or restitution is given as a result of the Crown's failure to honour, in whole or in part, the terms of an original agreement, often a treaty, or as a result of wrongdoing (as in fraud or expropriation without adequate compensation) that has occurred in the intervening period. This includes lands expropriated for rail and highway rights of way, military bases and weapons ranges, or other public purposes.

254. This distinction between direct and indirect sources of funding is significant in the treatment of transfers from other orders of government. When transfers include formulas for calculating the fiscal capacity of a recipient government, only direct sources of funding would be considered as a potential own-source.
255. The comprehensive claims process was first instituted in the 1970s and relates to land claims made by Aboriginal peoples on the basis of unextinguished Aboriginal title, rather than specific treaty agreements. Treaty land entitlements refer to lands promised to First Nations at the time of treaty, but to which the full entitlement was never granted. See Chapter 4 (in Part Two of this volume) for a fuller treatment of these processes.
256. Perhaps the most well-developed and comprehensive fiscal arrangement for Aboriginal government to date is that contained in the Quebec government's December 1994 offer for the comprehensive land claims of the Atikamekw and Montagnais Nation. Title V on financial provisions contains chapter 14 on funding autonomous governments, and chapter 15 on compensation, covering articles 89 to 103 of the offer. It addresses the underlying principles of taxation within the Aboriginal territories; shared resource management and resource revenues (including guaranteed revenue-sharing payments); transfer income and compensation.
257. The Atlantic Accord, memorandum of agreement between the Government of Canada and the Government of Newfoundland and Labrador on offshore oil and gas resource management and revenue sharing, 11 February 1985.
258. This analysis is drawn from Carolyn Dittburner and Allan M. Maslove, "Making Finance Fit: Funding Arrangements for Aboriginal Governments", research study prepared for RCAP (1994).
259. For an elaboration of the challenges faced by Aboriginal governments seeking to implement such approaches to self-government, see Alexandra Macqueen, "Current Practice in Financing Aboriginal Governments: An Overview of Three Case Studies", research study prepared for RCAP (1995).
260. Corporate income tax, too, is collected largely by the federal government. Only three of the larger provinces are in a position to realize economies of scale – Ontario, Quebec and Alberta – and have established their own collection systems for corporate taxes.
261. R.S.C. 1985, c. F-8. The framework is being replaced by the Canada Health and Social Transfer, the elements of which are set out in the *Budget Implementation Act* (cited in note 248).
262. Mary Ellen Turpel, "Enhancing Integrity in Aboriginal Government: Ethics and Accountability for Good Governance", research study prepared for RCAP (1995).
263. Kwakiutl District Council – Musgamagw Tsawataineuk Tribal Council, "Kwakiutl Governance: Negotiating Mutual Beneficial Accommodations Through a Treaty Process", brief submitted to RCAP (1993).
264. Bear Robe, "Basis for Siksika Nation Governance" (cited in note 69), pp. 39-40.

265. Knockwood, "Case Study on Self-Governance" (cited in note 72).
266. Kwakiutl District Council, "Kwakiutl Governance" (cited in note 263), p. 22.
267. Leslie A. Brown, "Community and the Administration of Aboriginal Governments", research study prepared for RCAP (1994).
268. Knockwood, "Case Study on Self-Governance" (cited in note 72).
269. Brown, "Community and the Administration of Aboriginal Governments" (cited in note 267). The study Brown refers to is David M. Smith, "The Dynamics of a Dene Struggle for Self-Determination", *Anthropologica* 34/1 (1992), pp. 21-49.
270. Cree Trappers Association's Committee of Chisasibi, *Cree Trappers Speak* (Chisasibi, Quebec: James Bay Cree Cultural Education Centre, 1989), p. 14.
271. For a review of the effects of *Indian Act* governance on First Nations accountability systems and the emergent case law on duties and responsibilities of chiefs and councillors, see Turpel, "Enhancing Integrity in Aboriginal Government" (cited in note 262).
272. See, for example, Alfred, "The Meaning of Self-Government in Kahnawake" (cited in note 5); also, Brown, "Community and the Administration of Aboriginal Governments" (cited in note 267).
273. Union of Ontario Indians, "Anishinabek Traditional Governing" (cited in note 17), p. 39.
274. Turpel, "Enhancing Integrity in Aboriginal Government" (cited in note 262).
275. A copy of this law is included in Turpel, "Enhancing Integrity", Appendix A: Navajo Nation Ethics in Government Law.
276. See G. Bruce Doern, "The Politics of Slow Progress: Federal Aboriginal Policy Processes", research study prepared for RCAP (1994); Edgar J. Dosman, *The National Interest: The Politics of Northern Development 1968-75* (Toronto: McClelland and Stewart, 1975); Gordon Robertson, "Administration for Development in Northern Canada: The Growth and Evolution of Government", *Canadian Public Administration* 3/4 (1960), pp. 354-362; Augie Fleras and Jean Leonard Elliott, *The 'Nations Within': Aboriginal-State Relations in Canada, the United States and New Zealand* (Toronto: Oxford University Press, 1992); Frances Abele and E. J. Dosman, "Interdepartmental Coordination and Northern Development", *Canadian Public Administration* 24/3 (1981), pp. 428-451; Katherine Graham, "Indian Policy and the Tories: Cleaning Up After the Buffalo Jump", in Michael J. Prince, ed., *How Ottawa Spends 1987-88: Restraining the State* (Toronto: Methuen, 1987); Frances Abele and Katherine A. Graham, "Plus Que Ça Change...Northern and Native Policy", in Katherine A. Graham, ed., *How Ottawa Spends 1988-89: The Conservatives Heading Into the Stretch* (Ottawa: Carleton University Press, 1988), pp. 113-138; and Richard Paton, "New Policies and Old Organizations: Can Indian Affairs Change?", Centre for Policy and Program Assessment, Carleton University, 1982.



277. Harold Cardinal, *The Rebirth of Canada's Indians* (Edmonton: Hurtig, 1977); Harold Cardinal, "Canadian Indians and the Federal Government", *The Western Canadian Journal of Anthropology* 1/1 (1969), p. 90; George Manuel and Michael Posluns, *The Fourth World: An Indian Reality* (Toronto: Collier-MacMillan, 1974); J. Rick Ponting, *Arduous Journey: Canadian Indians and Decolonization* (Toronto: McClelland and Stewart, 1986); and Cassidy and Bish, *Indian Government: Its Meaning in Practice* (cited in note 182).
278. Sally M. Weaver, *Making Canadian Indian Policy: The Hidden Agenda 1968-70* (Toronto: University of Toronto Press, 1981).
279. Graham, "Indian Policy and the Tories" (cited in note 276).
280. An illustrative contrast is the way environmental activism by citizens – whether middle of the road or extra-parliamentary – and public opinion data highlighting Canadians' views about the importance of environmental protection have strengthened the hand of several ministers of the environment. In contrast, DIAND has been buffeted by dramatic reversals in federal policy signals, usually responding to rather than initiating these changes. To cite just one example, in 1966, the department released the Hawthorn report, the results of an independent study and Canada-wide consultation, which recommended recognition that treaty Indians had all citizen rights and an additional set of rights arising from the treaties. Just three years later, in 1969, the federal cabinet released a white paper that appeared to relegate treaty rights to the dustbin of history in favour of a campaign of aggressively promoting the full assimilation of Aboriginal people into the mainstream of Canadian society. The subsequent uproar and the Supreme Court decision in *Calder* led to the complete reversal of this approach just four years later, when the federal cabinet announced its willingness to negotiate 'modern treaties' with nations that had not yet negotiated treaties.
281. John L. Tobias, "Protection, Civilization, Assimilation: An Outline History of Canada's Indian Policy", *Western Canadian Journal of Anthropology* 6/2 (1976), pp. 13-30. See also Chapter 2 in this volume.
282. In the context of these criticisms, current DIAND initiatives can perhaps be seen more positively. Such initiatives include the Manitoba initiative, an effort to develop a federal policy on the inherent right of self-government, and overtures to First Nations chiefs concerning revisions to the *Indian Act*. From the standpoint of the Commission's deliberations, however, the jury is still out on these initiatives.
283. The practices of the maturing territorial governments and national Aboriginal organizations, as analyzed in Doern, "The Politics of Slow Progress" (cited in note 276), are instructive on this point.
284. It is important to distinguish between a ministry of state and a minister of state. Ministries of state are administrative organizations, generally without significant operational or spending powers. There are no ministries of state in the current organization of the government of Canada. Ministers of state, technically referred to as secretaries of state, are assigned specific responsibilities to support ministers in

cabinet. Secretaries of state are not cabinet members. There are currently nine secretaries of state: Multiculturalism; Status of Women; Parliamentary Affairs; Training and Youth; Veterans; Latin America and Africa; Asia-Pacific; Science, Research and Development; and International Financial Institutions.

285. Lionel D. Feldman and Katherine A. Graham, *Bargaining for Cities: Municipalities and Intergovernmental Relations – An Assessment* (Montreal: Institute for Research on Public Policy, 1979), Chapter 3.
286. Doern (cited in note 276) indicates that consideration was given in 1989 and 1992 to turning Industry Canada's Aboriginal business branch into a special operating agency. During the 1993 reorganization, some within government proposed separating the policy and service delivery responsibilities of the department. The idea was rejected in 1993 because of the extreme sensitivity of any changes in this policy field and the recognition that changes could no longer be made unilaterally.
287. David Osbourne and Ted Gaebler, *Reinventing Government: How the Entrepreneurial Spirit is Transforming the Public Sector* (Reading, Mass.: Addison-Wesley, 1992); and Susan D. Phillips, "How Ottawa Blends: Shifting Government Relationships with Interest Groups", in Frances Abele, ed., *How Ottawa Spends: The Politics of Fragmentation 1991-92* (Ottawa: Carleton University Press, 1991).
288. The Commission's fundamental recommendations regarding Aboriginal governance require a shift in federal perspective away from highly conditional funding arrangements to a much more varied fiscal framework. The Commission itself will have provided a major conceptual foundation for this review through the work of Dittburner and Maslove, "Making Finance Fit" (cited in note 258), and Douglas Brown and Jonathan Rose, "Exercising Aboriginal Self-Government: The Intergovernmental Transition", research study prepared for RCAP (1995). A major task remains, however. The federal government must refine the Commission's conceptualization of the government-to-government fiscal relationship, partly on the basis of more sophisticated data on federal spending related to Aboriginal people than the Commission was able to obtain.

In addition, the Commission's recommendations imply a need for the federal government to assess the full level of funding related to Aboriginal affairs and to evaluate the allocation of funds among its various responsibilities and initiatives. Consideration of the level of federal support for initiatives such as the proposed treaty commissions and the centre for research and policy on Aboriginal economic development would fall into this category.
289. For further discussion of past policy and the corporate culture of DIAND, see Doern, "The Politics of Slow Progress"; Abele and Graham, "Plus Que Ça Change"; and Paton, "New Policies and Old Organizations" (all cited in note 276).
290. See, for example, Knockwood, "Case Study on Self-Governance" (cited in note 72).
291. Aboriginal people have long seen the need for this. Commentaries on the history of Aboriginal/Canada relations since the early 1960s have shown, however, that occasions that Aboriginal people thought were for joint planning were viewed by

- government officials as lobbying sessions. This inconsistency in expectations contributed to Aboriginal peoples' distrust of Canadian governments and to a souring of relations. See, for example, Weaver, *Making Canadian Indian Policy* (cited in note 278); and Katherine A. Graham, Carolyn Dittburner and Frances Abele, *Soliloquy and Dialogue: The Evaluation of Public Policy Discourse on Aboriginal Issues Since the Hawthorn Report*, volume 1 of RCAP, *Public Policy and Aboriginal Peoples, 1965-1992* (Ottawa: Supply and Services, forthcoming).
292. Royal Commission on Electoral Reform and Party Financing, *Reforming Electoral Democracy*, Volume 2 (Ottawa: Supply and Services, 1991). See, in particular, the report to the Royal Commission on Electoral Reform and Party Financing by the Committee for Aboriginal Electoral Reform, "The Path to Electoral Equality", 1991. All five members of the committee were Aboriginal persons and either sitting or former members of Parliament.
  293. For a general review, see Robert A. Milen, "Aboriginal Constitutional and Electoral Reform", in Robert A. Milen, ed., *Aboriginal Peoples and Electoral Reform in Canada*, Volume 9 of the Research Studies of the Royal Commission on Electoral Reform and Party Financing (Toronto: Dundurn Press, 1991).
  294. Based on data in Robert A. Milen, "Canadian Representation and Aboriginal Peoples: A Survey of the Issues", research study prepared for RCAP (1994).
  295. See Chapter 5 on implementing Aboriginal constituencies in Volume 2 of *Reforming Electoral Democracy* (cited in note 292).
  296. Augie Fleras, "Aboriginal Electoral Districts for Canada: Lessons from New Zealand", in Milen, ed., *Aboriginal Peoples and Electoral Reform in Canada* (cited in note 293).
  297. First Ministers Meeting on the Constitution, *Consensus Report on the Constitution* (cited in note 188), section 22, p. 8.
  298. First Ministers Meeting on the Constitution, *Consensus Report on the Constitution*, section 9, p. 4.
  299. For a fuller description of the Saami parliaments, see David C. Hawkes and Bradford W. Morse, "Alternative Methods for Aboriginal Participation in Processes of Constitutional Reform", in Ronald L. Watts and Douglas M. Brown, ed., *Options for a New Canada* (Toronto: University of Toronto Press, 1991).
  300. Peter Jull, "A Thousand Years: Indigenous Peoples and Northern Europeans", research study prepared for RCAP (1994).

## APPENDIX 3A

# EXISTING FINANCIAL ARRANGEMENTS FOR ABORIGINAL GOVERNMENTS AND REGIONAL AND TERRITORIAL GOVERNMENTS

### Indian Band Government

Until at least the 1950s, the federal government, through the department of Indian affairs (DIAND), was directly responsible for providing the vast majority of services to on-reserve Indians. Since that time, band governments have come to assume more and more responsibility for delivering and administering these services themselves. The financial arrangements currently in place to support these activities fall into three programs of transfers from DIAND: contribution arrangements, comprehensive funding arrangements, and alternative funding arrangements.

#### *Contribution Arrangements*

Contribution arrangements are used to fund programs or projects requiring significant interaction between DIAND and the recipient government, such as major capital projects. Contributions involve substantial terms and conditions that stipulate matters such as the service to be provided, to whom, and what expenses are eligible for reimbursement. Any amount left unspent is to be returned to the federal government.

#### *Comprehensive Funding Arrangements*

Sixty-five per cent of all funds currently transferred by the department to *Indian Act* governments are realized through the comprehensive funding arrangements (CFA) program, a mix of contributions, lump sum grant funding, and flexible transfer payments.<sup>1</sup>

#### *Contributions*

Contributions are open-ended financing arrangements in which DIAND undertakes to finance all eligible expenditures associated with the provision of particular services to band members. For these designated services, DIAND retains all control over program design and the allocation of funds, while band governments are responsible for administering the services and reporting regularly to the federal government. Before the establishment of the broader CFA program (which includes a mix of transfers), contribution agreements were the primary instrument for financing band government activities. Now, as part of the CFA program,



contribution agreements fund only those services involving a high level of technical complexity or a high level of risk, such as in the case of social assistance programs. In this case, a manual specifies eligibility requirements and benefit schedules that must be complied with in order for payments made by the Indian band to be eligible for reimbursement.

### *Grants*

The grant portion of the CFA program is specifically earmarked for financing the institutions of band government and their administration. This is an unconditional grant, with no specific terms or conditions attached to it.

### *Flexible transfer payments*

Flexible transfer payments (FTP) are special transfer payments that were introduced as an alternative to contribution agreements, providing for increased flexibility in the form of more autonomy for band governments to determine the means of delivering specified services. When any savings are realized through these alternative means, band governments are free to spend the surpluses generated in any manner they see fit. This limited autonomy allowed under FTP, however, is traded off against more onerous reporting requirements compared to contribution agreements.

### *Alternative Funding Arrangements*

A lot of times our funds are earmarked already. We are told, 'This is for child initiatives; this is for this; this is for that.' In our community we know our needs are a lot different from what has been told to us. We need to be able to have a say, as a community, where we want to have those dollars go.

Chief Agnes Snow  
Canoe Creek Indian Band  
Kamloops, British Columbia, 15 June 1993

The most recent approach to financing *Indian Act* governments is the alternative funding arrangements (AFA) program. It was established in 1986 as an alternative to the CFA program and now accounts for 20 per cent of all funding transferred to band governments from DIAND.<sup>2</sup> Similar in nature to the FTP scheme, but generally on a multi-year basis, the AFA program provides for more autonomy for band governments regarding the allocation of funds for different uses. In practice, a band government will negotiate with the department what is essentially a conditional grant for the provision of particular services. Once those funds are transferred, however, band governments have the authority to redesign programs and to reallocate funds between various programs and projects.

## Sechelt Indian Band Self-Government

The legal framework for the fiscal arrangements for the Sechelt band is provided by federal legislation (the *Sechelt Indian Band Self-Government Act*) and provincial law (the *Sechelt Indian Government District Enabling Act*). The latter gives Sechelt, and the 33 reserves it contains, legal status as a municipality.

The federal legislation effectively replaced most of the elements of the *Indian Act* for the Sechelt band. The Sechelt band, as a legal entity, can thus enter into contracts, acquire property and borrow funds and has been given fee simple title to all its reserve lands. It is responsible for providing public services in the areas of education, health, testate or intestate succession, public order and safety, and social and welfare services.

Perhaps the most important point concerning the fiscal arrangements is the power given to the Sechelt band in the federal law for "taxation, for local purposes, of interests in Sechelt lands, and of occupants and tenants of Sechelt lands in respect of their interests in those lands". Thus the Sechelt band has taxation authority over both Aboriginal and non-Aboriginal residents. This is significant, because roughly 50 per cent of the residents on Sechelt lands are non-Aboriginal.

Section 32 of the federal legislation also allows for moneys held by the government of Canada for the Sechelt band (as the band existed under the *Indian Act*) to be transferred to the band. Five-year agreements establish a base level of funding that is indexed to the Consumer Price Index and to growth in the on-reserve status population and is conditional upon providing existing standards of specified public services. These services include the operation of band-owned schools and the provision of education support services, social services such as shelters and special needs, job creation and economic development. Capital expenditures include transfers to the Sechelt Indian Band Housing Program, construction and improvement of roads and bridges, purchase of machinery, equipment and lands for use by the Sechelt band, and payments to local school districts for Sechelt's negotiated share of capital construction.

DIAND expenditures in 1984-1985 for the Sechelt band served as the initial basis for the transfer payments to the band under the original five-year funding agreement (1986-1991). A new funding agreement was signed in 1991 covering the next five-year period. This new agreement gives the band a single lump-sum grant at the beginning of the fiscal year, with annual adjustments made to reflect the rate of inflation and changes in the band's population. The funding now allows the range of services to be extended to include the provision of nursing services, health and medical supplies, and it includes the funds that had been allocated to the band under the Canadian Aboriginal Economic Development Strategy. The arrangement eliminates the need for separate contribution agreements to be reached between the band and the various departments of the federal government that would normally provide services to Sechelt residents.

## Regional Governments

### *Kativik Regional Government*

The Kativik Regional Government (KRG) is recognized as a municipal corporation by the *Act Concerning Northern Villages and the Kativik Regional Government*, which also provides the legal framework for the fiscal arrangements between Kativik and the Quebec government. Although KRG has the legal authority to levy taxes within its territory, and has entered into tax-sharing agreements with Canada and Quebec, KRG leaves many of the tax fields open entirely for the 14 municipalities that make up the region. Quebec's Bill 23 (1978) gives municipalities within the Nunavik region the power to levy municipal-type taxes (a portion of which is paid to KRG), as well as raising revenues through issuing licences or permits and charging fees for services and rentals. Each municipality, however, must submit its budget proposals to KRG, which, in turn, must have its global budget approved by the Quebec department of municipal affairs. KRG also has a resource revenue sharing agreement and has the authority to borrow funds.

The bulk of the funding for KRG comes in the form of conditional grants from a large number of federal and provincial government departments. The amount of these grants must be negotiated each year with each department that has entered into a contractual agreement with KRG. These contracts are usually for periods of three years. For example, the recent contract signed between the Quebec department of public security and KRG for locally controlled police services is for a duration of three years, but the annual transfer amounts from the department to KRG to finance these services must be renegotiated each year. Therefore, KRG is subject to the funds made available to the department by the Quebec cabinet. This approach is time-consuming and expensive.

### *Cree-Naskapi*

The *Cree-Naskapi (of Quebec) Act* applies to the Naskapi band of Quebec and eight Quebec Cree bands. This act gives the bands local by-law powers that translate into authority to levy taxes (other than income taxes) and to charge fees for licences or services. The bands control their own capital and revenue funds, although the minister of Indian affairs is entitled to inspect all band accounts, financial records and auditor's reports. The bands may also borrow moneys through a by-law that specifies the amount to be borrowed, its purpose, and the manner and terms of repayment.

The fiscal arrangement between the federal government and the Cree-Naskapi takes the form of cash grants with few conditions attached. Annual funding is determined by adjustments to the DIAND funding base for the 1984-1985 fiscal year, with subsequent adjustments made for changes in population, inflation, uncontrollable major cost components in northern isolated commu-

nities (for example, fuel, transportation and utility costs), additions to housing and local infrastructure, reinstatements of band members, as well as any special needs that may arise from time to time. Funds are allocated to the individual bands based on proportional distribution and subject to a few negotiated factors. Seventy-five per cent of the grant is paid at the beginning of the fiscal year, with the remainder paid once certain conditions regarding accountability have been met.

## Territorial Government

### *Yukon Territorial Government*

A similar model is found in the *Yukon Territorial Government Formula Financing Agreement*. This model is an alternative to the formula used to calculate equalization payments from the federal government to the provinces, but is based on the equalization principles set out in section 36 of the *Constitution Act, 1982*. It is based on historical estimates of spending for the provision of “reasonably comparable levels of public services” to those in other provinces and territories of Canada. This base, referred to as the gross expenditure base (GEB) is then adjusted to reflect population and inflation changes.

GEB is calculated on a per capita basis which, for 1991, was estimated at approximately \$13,000. This represents the maximum transfer, or ceiling, available from the federal government. However, all other revenues available to the Yukon government are deducted from GEB. These revenues include payments under various shared-cost programs, such as the former Established Programs Financing and the Canada Assistance Plan; and recoveries from various programs and agreements such as DIAND’s family and children’s services and hospital and medical care programs, the economic development agreement, and the Inuvialuit Final Agreement, for example. Also deducted from the expenditure base are the own-source revenues available to the Yukon government, such as tax revenues (for example, income tax, school and property tax, as well as taxes on fuel oil, tobacco, liquor and insurance premiums), investment income, licences, fees and permits, and fines. The difference between GEB and the revenues available to the government is the amount of the formula financing transfer payment.

The main advantage of this approach is its flexibility, which would make it attractive to Aboriginal nation governments that do not yet enjoy a level of economic development that would allow for a significant tax base, as well as those that require a period to catch up. The tax effort of the Aboriginal government would have to be factored into the formula, as is the case for the method of calculating equalization for provinces. This would likely be done by assuming that the Aboriginal government is levying taxes, where it has authority to do so, at the national average rate.<sup>3</sup> Without such a factor, a decision by a government not to tax in an area in which it has authority to do so would result in an increased



transfer from the federal government. To be consistent with the broad principles of equalization, and to prevent the creation of tax havens, it should be the Aboriginal government that bears the fiscal consequences of such a decision.

## Analysis

By far the most serious critique of financial arrangements associated with the *Indian Act*-style governing relationship is the excessive costs of negotiation and administration associated with such a relationship. DIAND, for example, expends a portion of its budget advising on and monitoring services that are devolved to band governments, in addition to its responsibilities for managing program design and providing funding for the services themselves. Band governments, for their part, are subject to excessive and complex accountability requirements, which draw significantly on the time and other resources available for actually delivering the services. We should note that many improvements have been made in the past decade regarding these accountability requirements, notably with the introduction of the AFA program. However, these accountability provisions, and the related costs of administration, typically still exceed those associated with transfers received by provincial and even municipal governments.

A related and equally important critique of the DIAND band government relationship stems from the fact that the size of transfers under either CFA or AFA is determined in separate negotiations between the federal government and individual band governments, rather than through formula-based financing mechanisms that would apply to *all* band governments. This has two important implications, one related to the process of negotiation and the other to equity considerations.

To begin with, each band must allocate scarce resources to a continuing and regularized negotiation process. These negotiations often occur on an annual or ad hoc basis, in contrast to federal/provincial fiscal arrangements, which are renewed regularly every five years. More fundamentally, the prospect of a fair and balanced negotiation process is nearly impossible given the overwhelming imbalance of the parties at the table – small band governments, often representing communities of fewer than a thousand people, with limited own-source revenues and institutional capacity, versus federal negotiators who not only have the administrative resources of an entire federal department to draw upon, but are also the gatekeepers of the federal government's fiscal largesse.

As well, negotiations for transfer levels conducted on a community-by-community basis are not designed to take sufficient account of (1) the resources available to different bands; (2) the varying abilities of band governments in terms of institutions and personnel to administer or deliver programs; or (3) the differences in the costs of service delivery borne by different band governments in providing the same services. By contrast, when the level of fiscal transfers is determined on the basis of a funding formula (or formulae), and these broader

arrangements are negotiated simultaneously by Aboriginal, federal, provincial and territorial governments, the negotiation process is simplified, more cost-effective, and more likely to produce equitable results across Aboriginal nations.

Finally, it should be noted that CFA and AFA programs apply only to service delivery for band members residing on-reserve, as determined by the federal government. In some *Indian Act* communities, this can mean that up to 50 per cent of a nation's members are not properly or adequately funded.

## NOTES

1. Department of Indian Affairs and Northern Development, "DIAND's Evolution from Direct Service Delivery to a Funding Agency", background paper prepared for RCAP (1993), p. 13. Note that an additional 13 per cent of funding for band governments is realized through contribution agreements that have been established outside the CFA framework.
2. DIAND, "DIAND's Evolution".
3. For a fuller description, see Thomas J. Courchene and Lisa M. Powell, *A First Nations Province* (Kingston: Institute of Intergovernmental Relations, Queen's University, 1992).

## APPENDIX 3B

### A SUMMARY OF THE PROPOSAL BY THE NATIVE COUNCIL OF CANADA FOR A HOUSE OF THE FIRST PEOPLES

The Native Council of Canada (now the Congress of Aboriginal Peoples) has proposed its vision of a more powerful and constitutionally entrenched House of the First Peoples, which would be a third chamber of Parliament and as such require a constitutional amendment. The proposal, developed in 1992 during the Canada round of constitutional negotiations, described a body of between 75 and 100 representatives.<sup>1</sup> Each nation or people would choose representatives, with adjustments made to acknowledge the influence of provincial and territorial boundaries. The primary function of the House of the First Peoples would be in relation to federal legislation, since it is assumed that Parliament will continue to legislate for Aboriginal peoples, as Aboriginal peoples, under section 91(24) of the *Constitution Act, 1867* ("Indians, and Lands reserved for the Indians"), as well as in other areas that will affect them, such as spending power, the environment, and the offshore. This assumption underlies all proposals for a third chamber or an Aboriginal parliament.

The Native Council proposed that the House of First Peoples have the power to veto certain legislation put before it, or that passing such legislation require a double majority of the House of Commons and the House of First Peoples, or that the House of Commons might refer certain legislation to the House of First Peoples for review. The House of First Peoples would be permitted to review or override Parliament initiatives concerning matters that "directly affect areas of exclusive Aboriginal jurisdiction...or where there is a substantial impact of a particular law on Aboriginal peoples".<sup>2</sup>

The Native Council of Canada also saw a role for a third chamber in ratifying constitutional amendments, particularly those affecting the rights and interests of Aboriginal peoples, although it did not see the House of the First Peoples becoming involved in constitutional negotiations and intergovernmental relations.

A number of options were proposed for selection of representatives to the House of the First Peoples:

1. by electoral districts representing all Aboriginal peoples within that district;
2. by electoral districts representing each Aboriginal people (that is, separate representation for First Nations, Inuit and Métis people);
3. through appointment by Aboriginal organizations or Aboriginal governments;



4. through indirect elections in which Aboriginal associations or Aboriginal governments represent each Aboriginal people; or
5. through indirect elections in which an electoral college mechanism is established composed of delegates of each Aboriginal people.

As the proposal noted, the method of selection would have to reflect Aboriginal principles of democracy within their own institutional framework. In many instances representatives would be elected directly, but in a number of nations indirect representation might reflect more accurately traditional Aboriginal ways, in which consensus decision making is favoured over the more adversarial approach of non-Aboriginal Canadian politics.

## NOTES

1. Native Council of Canada [Congress of Aboriginal Peoples], "House of the First Peoples", paper tabled in Working Group II of the Continuing Committee on the Constitution, 31 March-2 April 1992, Canadian Intergovernmental Conference Secretariat document 840-614/015.
2. "House of the First Peoples", p. 3.













